



TRIBAL ICWA ADVOCATE TRAINING HANDBOOK

Presented by



through the support of California Department of Social Services (CDSS)

Use and Disclaimers

This publication is designed to assist non-lawyer, ICWA advocates and tribal representatives who appear in state court.

Not all California tribes have the resources to hire attorneys for every Dependency case. In the alternative, tribes regularly rely on tribal social workers, referred to in this Handbook as ICWA advocates—although social workers are not, strictly speaking, acting as advocates for one party or another. As a general rule, most other parties in dependency cases are represented by appointed or assigned legal counsel, including the social services agency, the parents or Indian custodian, and the child.

The ICWA advocate represents the interests of the tribe, which may or may not align with other parties. Advocates may have knowledge specific to child welfare laws and the ICWA, but might find that their knowledge of the complex state child welfare system (known as Juvenile Dependency law) may be limited. The advocate might also find themselves having to render these services with little to no legal training and/or courtroom advocacy experience – whether formal or informal.

The Tribal ICWA Advocate Training Handbook is a *reference tool* for tribal advocates in their participation in dependency proceedings, but is not a substitute for legal counsel. The Handbook is not intended to be legal advice, and is not intended to be a comprehensive discussion covering all legal issues or authority. Moreover, any tips provided in this Handbook suggestions, not the law.

When referring to the Tribal ICWA Advocate Training Handbook, it is critical that the reader keep in mind that each case, situation, and legal circumstance is unique. Each issue can also involve a number of complex issues that can cross over to number of other legal areas. State and Federal law is subject to change, therefore readers must monitor developments in the law and practice. Further research and/or consulting with an attorney may be appropriate. CILS is available to represent individual tribes on cases consistent with our intake policies.

Credits

This publication was financially assisted by grant funds from the California Department of Social Services. The opinions, findings, and conclusions in this publication are those of the author and not necessarily those of the California Department of Social Services. California Indian Legal Services gratefully acknowledges the California Department of Social Services.



TRIBAL ICWA ADVOCATE TRAINING

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Blake Atkerson – CILS Staff Attorney

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TRIBAL ICWA ADVOCATE TRAINING

Program Agenda & Topic Outline

Presented by Mark Radoff – CILS Senior Staff Attorney
Blake Atkerson – CILS Staff Attorney

- *Mark Radoff*: Senior Attorney, Escondido.

Mark has over 30 years of legal experience. He graduated from the University of California, Santa Barbara with a B.A. 1981 and earned his J.D. from the University of the Pacific, McGeorge School of Law in 1985. Mark's background includes representation of parents, minors and tribes in Dependency cases and minors in Delinquency case. He currently sits as the Chief Judge for the Chemehuevi Tribal Court. In addition, Mark has practiced in commercial, gaming, and tribal land use matters, including economic development, negotiating in financing and management contracts. Mark has filed and argued three ICWA Amicus Briefs before the California State Supreme Court and co-written various other Amicus Briefs in state and federal courts on the ICWA and NLRA. He has written and trained on the ICWA and is a member of the Judicial Council's Tribal-State Judge's Forum, as well as the California Tribal Judge's Association. He also handles civil litigation in state, federal and tribal courts, and advises tribal governments on drafting and implementing tribal ordinances, on water, environmental, probate, child welfare, leasing and business regulation.

- *Blake Atkerson*: Staff Attorney, Sacramento.

Since graduating from University of California, Hastings College of the Law in 2012 with a Juris Doctorate (J.D.) and certificate in Health Law and Policy, his focus has been tribal and local government law, policy, and program implementation. He assisted tribes in Northern California and Oklahoma on economic development projects, sovereignty, taxation, constitutions, by-laws, employee manuals, and operating procedures. While working at the Sonoma County Water Agency, Blake obtained extensive experience in local government contracting and policy implementation that included environmental education, groundwater regulation, construction, and federal, state, and private grant administration. As a member of the Osage Nation, Blake grew up understanding the ongoing issues faced by Native Americans across the country and was fortunate to have a supportive family that helped him maintain a connection to his people. However, it was the exposure to the specific issues facing California Indians that galvanized his resolve to make a difference in their lives that the privilege of being an attorney grants him.

Program Materials:

(1) ICWA Advocate Guide for California Courts® (free download at www.calindian.org) (Bound Copy Distributed at Training)

(2) Dependency Law and Skills Program Handbook (Distributed at Training)

Topic Agenda & Outline

Day Number 1

I. »Introductions & Overview

- A) Goal of Training: Understanding the Intersection of Dependency Law and the ICWA.
- B) Role of the Non-Attorney ICWA Advocate.
- C) Tracking Dependency Timeline and Common Hearings and Issues.

II. »Topic One.

What are Dependency Cases & Functions of ICWA Advocate or other Tribal Representatives.

III. »Topic Two.

Initial Hearing & Detention. Removal or non-removal from parents, contact with tribe, notice and finding of emergency placements.

III. »Topic Three.

Jurisdictional Hearing-Purpose & Function. What does an adjudication mean, and what authority is given to the court. Role of ICWA Advocate in hearing and intervening tribes vs. non-intervening. Ongoing hypothetical case based on current issues.

IV. »Topic Four.

Disposition-Most Important Hearing, Biggest Role for Tribe and ICWA Advocate.

V. »Topic Five.

Review Hearings, Periodic Reviews and Supplemental Petitions. What part of the process? Reason for Hearings. Role of tribe or tribes.

Day Number 2

VI. »Topic Six.

Permanent Plans and Case Plans.

VII. »Topic Seven.

Transfers to Tribal Court. How to transfer? Who can transfer? Effect of moving case to a tribal jurisdiction, and what are the grounds or bases for denying a transfer. Exclusive vs. Concurrent Jurisdiction.

VIII. »Topic Eight.

Procedural Issues: Membership; Intervention; Burdens of Proof; Active Efforts; By-Pass of Services; Termination of Parental Rights; and Invalidation.

IX. »Topic Nine.

Tribal Customary Adoption. What is a TCA? Concurrent Plans. Timing and Procedure. Reason why TCA may be preferable because it does not legally terminate a parent's rights.

X. »Topic Ten.

BIA Guidelines and Regulations. Purpose of the BIA Regulations? Pre-emption of state law by federal law. Guidelines? Regulations? Amended Guidelines? State Law? Rules of Court? Which law to follow? What are the changes in the final Regulations that may conflict with California state law and how to argue issue (not necessarily resolve discrepancies).

Day Number 3

XI. *Topic Eleven.*

»History and Policy of the ICWA. Why was the ICWA adopted? Outgrowth of historic movement to supervise foster care and protect children. Why a separate law? Role of advocates and non-attorney tribal members in cases and process. Continued Discussion of BIA Regulations and effect on California state law

XII. »*Topic Twelve.*

Roundtable Discussion. Problem solving of specific advocate questions, scenarios, cases. Anonymous presentation of facts and preservation of confidentiality, but this will be an informal brainstorming of real-life situations and ways to address. Methods that Advocates can use to participate in cases with technology and remotely.



ICWA Advocate Training

Dependency Law for Non-Attorneys

Presented by:
 Mark Radoff - CILS Senior Attorney
 Blake Atkerson – CILS Staff Attorney
 California Indian Legal Services
 through a grant from the California Department of Social Services

Introduction & Overview

Goals of Training

CILS Presenters

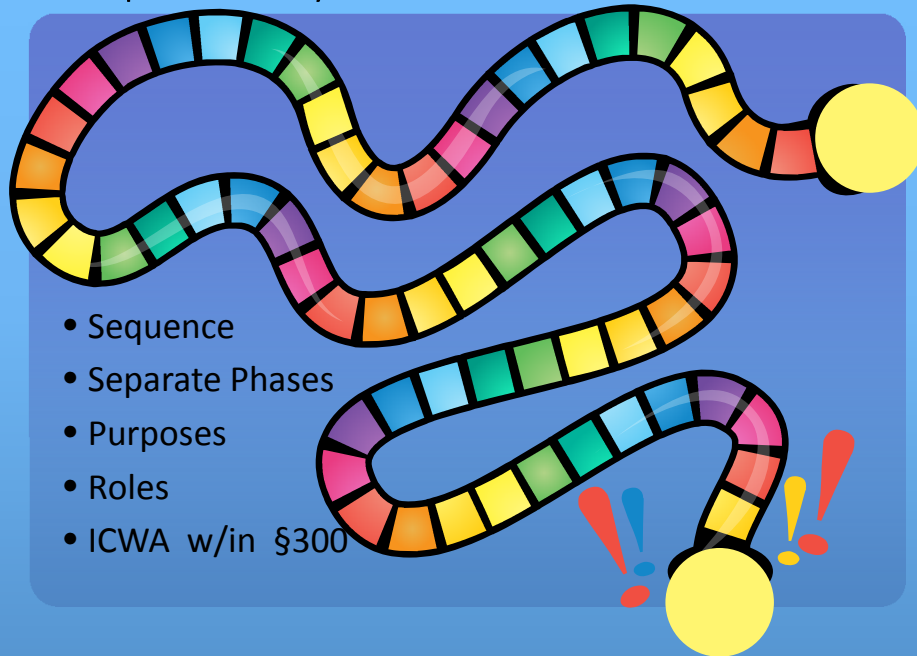
Mark Radoff: Senior Attorney, Escondido

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Dependency Cases: Follow a Timeline



Outline of Training

(1) Introduction
& Overview

(2) Role of ICWA
Advocates in
Dependency

(3) Detention
and Emergency
Removal

(4) Jurisdiction
& Adjudications

(5) Dispositional
Hearings & Case
Plans

(6) Periodic
Review Hearings

(7) Permanency
Planning

Outline Continued:

(8) Transfers to
Tribal Court

(9) Procedural
Issues

(10) Tribal Customary
Adoption &
Permanency
Alternatives

(11) BIA
Regulations &
Guidelines: Effect
on State Court

(12) Appeals, Writs
& Post
Permanency

(13) Technology &
Access Issues;
History & Policy of
ICWA

14) Roundtable—
Problem Solving

Indian Child Welfare Act – Dependency & Advocates Roles

Open
Discussion:



Participants' List

Identify Purpose
of Advocates

Topic No. 1

What are Dependency Cases?



Role of ICWA Advocates or other Non-Attorneys?

Dependency Law

-Juvenile Court: Separate Laws & Proceedings

-Three Goals: (1) Safety & Protection of Children; (2) Family Preservation; and (3) Timely Provision of Stable and Permanent Homes for Children.

-The Indian Child Welfare Act (ICWA) operates within Dependency Court! Not a stand-alone law

-California has state ICWA laws and Federal laws apply. Both apply, but federal controls.

Dependency is Pizza



Don't Eat Whole Pie
Cut into Slices

Dependency follows Natural Progression: Beginning-Middle-End

Beginning: Removal and Detention

Middle: Jurisdiction-Disposition-Reviews

End: Permanency-Reunification-Termination

Advocates are Not Attorneys

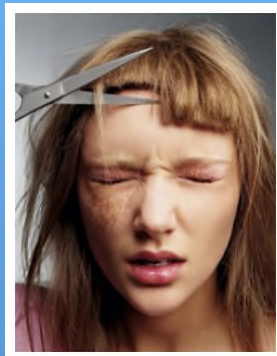
-Advocates Appear as Tribal Representative CRC 5.534(i)

-Legal Counsel not Required under ICWA

-Confidentiality & Privilege Do Not Apply

-Can Ask Questions, Submit Reports and Obtain Discovery

Never Represent Yourself or Cut Your Own Hair



Let Someone Else Cut



Outside representation isn't necessarily pleasant
But, it is easier once you understand the process.

California Allows Tribal Advocates to Assume Some Attorney Roles

Tribes can intervene as a party in Indian child proceedings at any stage: 25 U.S.C. §1911 and Welfare & Institutions Code §224.4.

ICWA treats intervening parties identically: Make Record; Examine Documents & Witnesses; Request Transfer; Make Motions; and Invalidate.

Indian Child Welfare Act Additional Requirements

The ICWA adds procedural safeguards for Indian children and the tribe can assert through an attorney, tribal representative or ICWA Advocate

Notice

California (and federal law) requires Notice to an Indian child's tribe in all Dependency cases proceedings involving Indian child custody.

Notice law is W&I §224.2 and 25 USC §1912

California uses Judicial Council Forms ICWA-020 and 030 to gather information

Notice Triggers Tribe's Right to Intervene

Intervention can occur in writing or orally.

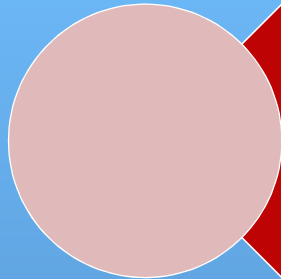
Specific form is not required, but Judicial Council has a permissive form.

Permissive Form

Judicial Council ICWA-040

State Suggested Form Per CRC
5.534(i)(2)

Identifies Who Intervenes or is
Designated as Tribal Representative
& Powers Exercised



Intervention includes
“entering an
appearance” and
requesting discovery
and disclosure of
documents

Intervention Citation is W&I §224.4

Definitions Matter



Most every statute or tribal law or regulation has definitions.



Definitions are like code, and dictate how a law is applied or when it applies.

Indian Child Custody Proceeding

§1903 defines an Indian child as an unmarried person under 18 years old who is a member; or eligible for membership in an Indian tribe and biological child of member.

Custody proceeding is removal of Indian child from parent or Indian custodian where parent/custodian cannot have child returned upon demand.

Not all Custody Proceedings Trigger ICWA

- Not applicable to divorce custody cases

- Not applicable in most delinquency (criminal) cases

- Not applicable in voluntary placements

- Act does apply in adoptions and guardianships

ICWA Act Applies With or Without Intervention

Tribes should participate, but even if they do not, the Act applies

If tribe does not “intervene” the Act still applies if a finding is made that case is an Indian child custody proceeding

Advocate as Representative

An ICWA Advocate can:

- Make a record
- File Reports or Home Studies
- Object to Reports, Documents or other Evidence
- Request Modification of Orders or Case Plans
- Make Arguments on Merits and Placement Preferences
- Request Transfers to Tribal Court

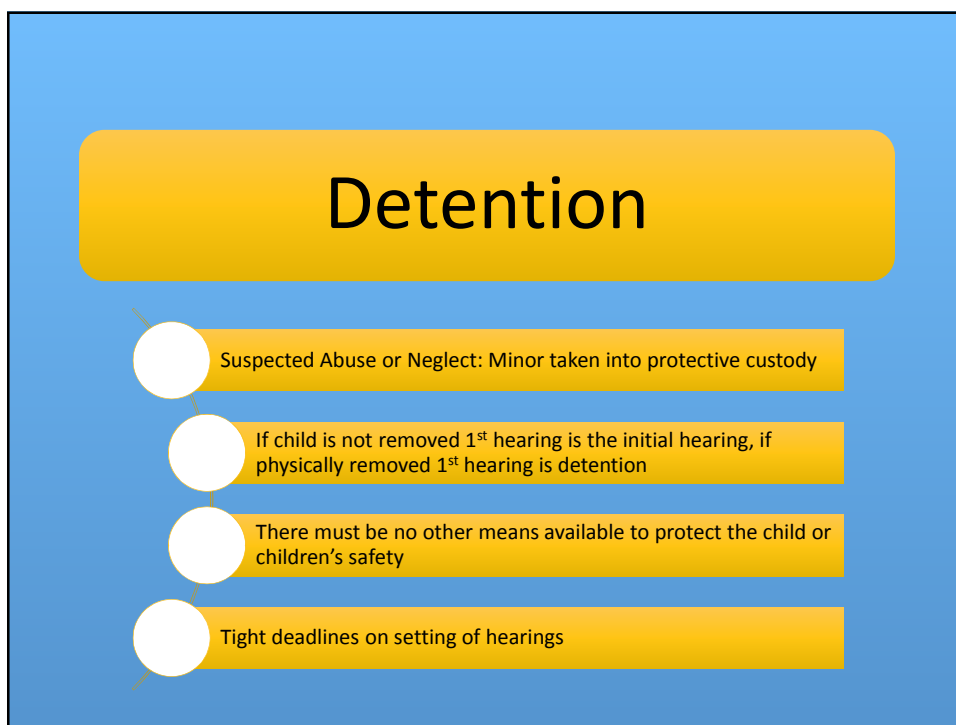
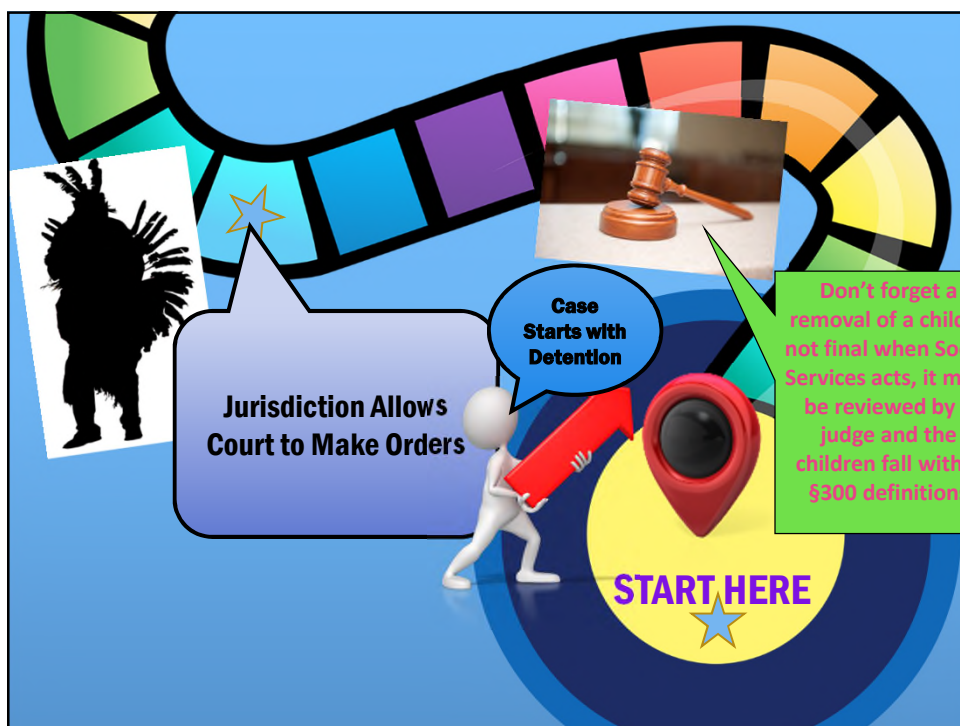
ICWA Advocate Operates Within Dependency Framework

No separate timetable for
ICWA case. It follows state
Dependency law and
procedure

First hearing is
usually Detention,
also called the
Initial Hearing

Topic 2

Initial Hearing--Detention



Detention Time Limits



Petition must be filed within 48 hours of detention



Hearing must occur within one judicial day of filing



Court must consider whether any reasonable alternatives available: Voluntary Services; Family Placement; Informal Supervision. Fact Specific.

Additional Detention Purpose

- To Advise Parents of Allegations
- Appoint Counsel
- Enter Admissions or Denials
- Set Jurisdictional Hearing

Grounds For Detention W&I Code §319

1) Substantial Danger to Physical Health of child, or suffering severe emotional damage *and* no reasonable means to protect without removal

2) Parent Likely to Flee

3) Child Left Placement

4) Child Unwilling to Return Home

Tribal Involvement

☐ Should Tribe be Notified at Disposition?

☐ Can Tribe Appear?

☐ Can Tribe or Tribes Request Dismissal or Transfer?

☐ Can Tribal Advocate Offer Alternative Placement?

Hypothetical Example

Sioux O'Brien met Buster Chops in Pilates class, and they started dating. Their relationship went well and they moved in together, until Sioux discovered Buster's alcohol abuse, but by then she was pregnant with his child. Sioux stayed with Buster and he didn't start hitting her until after the baby, Fostra was born. Sioux has chronic back pain and has a prescription for medical marijuana. When Buster insisted she move out and pushed her while holding the baby, Sioux struck him back. The neighbors called Social Services (CPS).

Buster & Sioux

When CPS inspected the home they found Sioux's marijuana in an unmarked jelly jar. Sioux said she had obtained a restraining order against Buster but was afraid to have it served on him because she had no where else to live. She has another daughter, Linqish, who she voluntarily left with her aunt, Extenda in Utah. The aunt is willing willing to take Fostra until Sioux can find a safe place to live.

Sioux's grandmother always said she was eligible for enrollment in an Oklahoma tribe, but she never specified which tribe.

Detain Fostra?

CPS removed Fostra from Sioux's custody and a Detention Hearing is scheduled in four days. CPS' petition cites violence in presence of minor, excessive drug use, and a messy house.

Q: Is Detention Proper?

Q: What can Sioux or Buster argue?

Q: Should any Tribes be notified?

Detention Law

Detention: Emergency. Continued custody with parent or Indian custodian is contrary to welfare of child. (Welfare & Institutions Code §319)

No Reasonable Alternatives. Removal is last resort.

Lower *burden of proof*: prima facie showing.

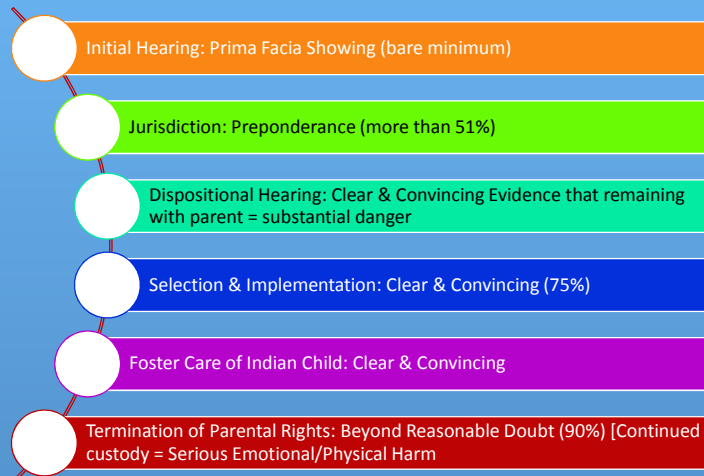
Release within 48 hours w/o showing.

Agency's Burden of Proof (Could Also be Called Showing)

Burden is like a scale, or weight



Burden (weight) Changes with each Type of Hearing



Sioux's Tribe

All Sioux can remember is that her grandmother's tribe was in South Dakota or Oklahoma and she thinks it started with a "C" or an "S."

On that basis Social Services completes the ICWA-030 form and sends notices to the following federally recognized Indian tribes: (1) Choctaw; (2) Cherokee; (3) Chickasaw; (4) Caddo; (5) Comanche; (6) Cheyenne River Sioux; (7) Crow Creek Sioux; and (8) Standing Rock Sioux.

Choctaw and Cherokee respond that Sioux may be eligible for membership because a woman matching her grandmother's name was on their rolls.

Tribes ask for Continuance

Both Choctaw and Cherokee decline to Intervene in the case, but ask for a 20 day continuance and delay in the Jurisdictional Hearing. Their request is denied by the Court because of the emergency need for placement.

The Cherokee Tribe discovers that Fostra's sibling (Sioux's oldest daughter living with the aunt in Utah) was born to a tribal member who was in the Navy when he and Sioux conceived. His name is Ensign Nada, and legal paternity has never been established, but the tribe has documented he is the biological father of Fostra's half-sister.

Tribal Intervention

Q: Can either tribe intervene at Jurisdiction?

Q: Can both tribes Intervene?

Q: What is the Law on multiple tribes?

Indian Child's Tribe

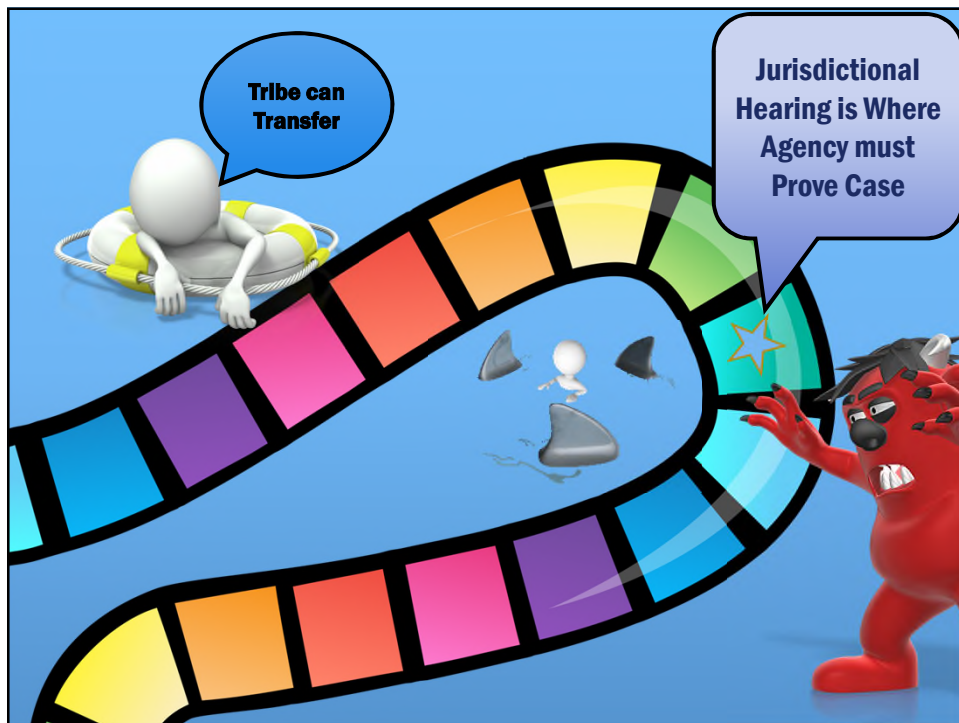
Remember...Definitions Matter.

25 U.S.C. §1903(5) defines Indian child's tribe as (a) one in which the child is a member; or (b) eligible for membership; or (c) if more than one tribe for which child is a member or eligible for membership—the tribe with which the child has the more significant contacts.

Factual Question.

Topic 3

Jurisdictional Hearing



Ten Jurisdictional Grounds

Jurisdiction or Adjudication:

Agency must prove that a child falls within one of the 10 jurisdictional categories: §300(a) – (j).

Child Described in §300

- (a) Serious Physical Harm: child has/substantial risk of serious (non-accidental harm)
- (b) Failure to Protect
- (c) Serious Emotional Damage
- (d) Sexual Abuse
- (e) Under 5 years old – severe physical abuse

Additional §300 Grounds

- (f) Parent/Guardian caused sibling death
- (g) No provision for support (abandoned, incarcerated parents)
- (h) Voluntary relinquishment by parent (for adoption)
- (i) Acts of cruelty by household member
- (j) Sibling Abuse

Purpose of Jurisdiction

Basic purpose is to quickly determine the merits of case.

Parents often claim case is filed "against" one parent or the other, sometimes that they are the "non-offending parent."

Dependency law decides if the *children* are defined in one of the 10 grounds, and if so, the court takes jurisdiction over the *child*. Distinction is important.

Timing and Notice

- Non-Detention Cases (no removal): Jurisdictional Hearing in 30 *calendar days* from petition filing (W&I §334).
- Detained Children: Hearing in 15 *days* (days means actual days, not court days).
- Written Notice must be given parents, Indian Custodian, and if reason to know, Tribe(s).

Contents of Notice

Notice must include:

- (1) Nature of Hearing;
- (2) §300 grounds initiated;
- (3) Date/Place/Time of Hearings;
- (4) Children's Names;
- (5) Include a Copy of the Petition;
- (6) Statement that Legal Counsel can be Appointed; and
- (7) If an Indian child, that the Tribe may intervene

Tribe Can Request Additional Time

- Tribe can ask for 20 day continuance
- Notice ensures Tribe(s) right to meaningful participation & assert ICWA rights
- Notice to all tribes child is a member or eligible for membership
- Proof of Service must be filed with Court
- Non-compliance subject to invalidation at later date

Buster, Sioux and Fostra's Jurisdictional Hearing

CPS discovers that Fostra's half-sibling, Linqish was placed out of state without a guardianship or provision for support and amends its petition to join Linqish.

Aunt Extenda is a Choctaw tribal member, but did not receive notice of the hearing as an Indian custodian.

Linqish is placed in a foster home in Simi Valley with Fostra with a non-Indian couple Bob & Sue DeFacto. The DeFactos have patiently been waiting to adopt an Indian child and live in an upper-middle class suburban neighborhood.

Contested Jurisdiction Issues

- (1) Sioux objects to the §300(a) (Serious Physical Harm) and §300(b) (Failure to Protect) allegations re Fostra.
- (2) Sioux also contests the Failure to Protect §300(b), and No Provision For Support §300(g), and Sibling Abuse §300(j) allegations against Linquish.
- (3) Buster does not contest anything, he submits to jurisdiction.
- (4) Extenda asserts she is an Indian Custodian and moves to dismiss the whole case for Linquish.
- (5) Ensign Nada asks for a lawyer as the biological father of Linquish and moves for a stay under the Soldiers & Sailors Relief Act.

What Happens at Jurisdiction?

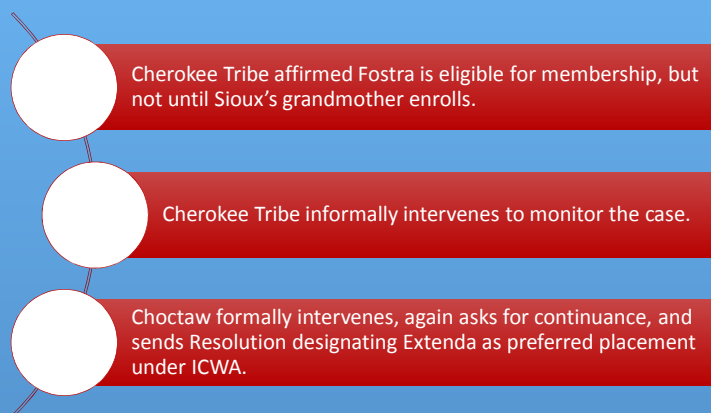
Does Sioux have any basis for Court to deny Petition?

Can Extenda appear? Does she get legal counsel?

Does Buster's admission affect Sioux?

(4) Can Ensign participate in the case? Is Linquish considered an Indian child?

The Court Takes Jurisdiction Without Either Tribe Appearing



Court Defers Finding on Membership

Judge rules that Fostra is only conditionally eligible for membership in Cherokee, but will apply the ICWA while her application is pending—Orders CPS to assist in obtaining membership.



With respect to Linqish, the Court holds that Ensign is not a presumed father, only alleged, and therefore Linqish is not legally his daughter and cannot be an Indian child. Judge rejects preferred placement with aunt, and requires ICPC as grounds to consider out of state placement in Utah.

Who Decides Membership?

A determination by an Indian tribe that a child is or is not a member of or eligible for membership in that tribe . . . shall be conclusive. (W & I Code § 224.3(e)(1) and see 25 C.F.R. § 23.108(b) (BIA Regulations effective Dec. 12, 2016).

Tribe Decides

The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law.

In re Abbigail A.

California Supreme Court affirmed tribes' rights to determine membership or eligibility, but invalidated Rule of Court 5.484(c)(2) requiring application of ICWA *before* membership determined, and charging Agency with securing membership (using active efforts).

Court upheld a companion rule, CRC 5.482(c) requiring Social Services to include membership application assistance as part of its Active Efforts.

In re Abbigail A. (2016) 1 Cal.5th 83.

Enrollment

California's ICWA is found throughout the Welfare & Institutions Code, and elsewhere.

Enrollment vs. Membership status is found in W&I §224.3(e)(1).

Jurisdiction is Significant

When a court takes jurisdiction it is finding that that court is allowed to make orders and has authority over that case.

Without jurisdiction the court *cannot* act.

All of the pre-jurisdictional orders and temporary detention orders can be challenged when a court does not have jurisdiction.

Jurisdiction = No Other Courts Can Hear Custody

- Once a Petition is filed in Juvenile Court *no other court* has jurisdiction to hear custody matters regarding these children.
- Not Family Courts, not Probate Courts (guardianships); no other courts have jurisdiction.
- One Court Rule prevents conflicting Orders. (See W&I §304), and includes jurisdiction over child and parents (W&I §302).

Caveat: Tribal Courts

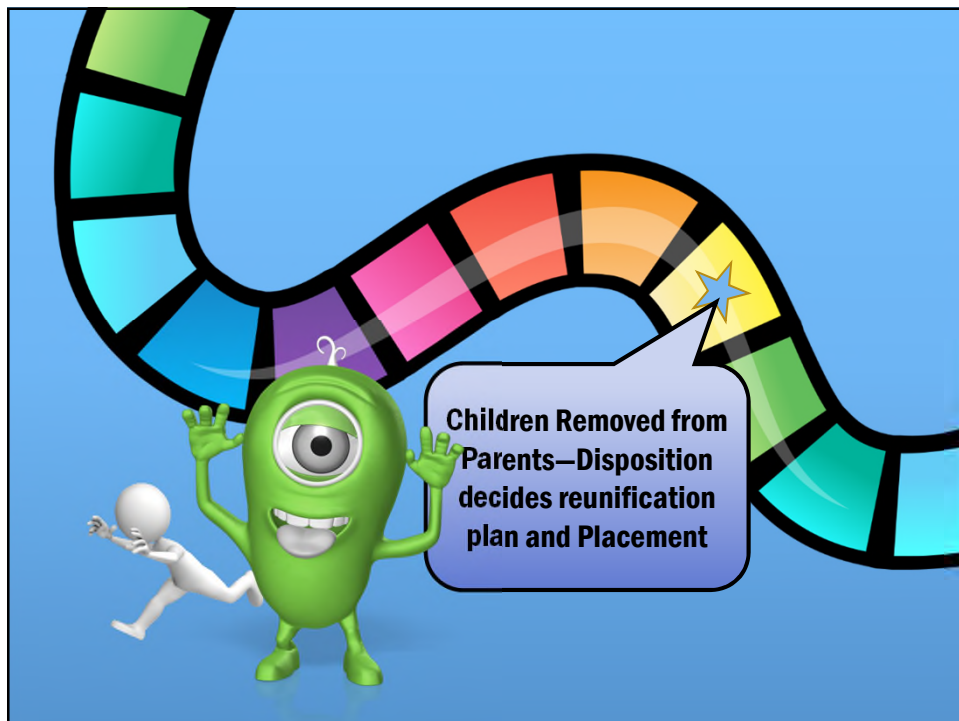
California is a Public Law 280 State, and under PL 280 California tribes and the State share *concurrent* jurisdiction over civil matters, including dependency cases.

Under the ICWA a California tribe may exercise exclusive jurisdiction over certain child custody proceedings

Tribe may invoke transfer to tribal court, subject to objections by either parent, tribe, or good cause exception.

Topic 4

Disposition



Disposition is Most Important Hearing

Disposition is where all significant decisions are made, including: removal or continued custody; case plan contents; placement during removal; restrictions on parents.

Dispositional Hearing

Hearing and adoption of case plan for reunification of family (if minors removed).

Distinguish Family Maintenance and Family Reunification. [Active Efforts to ICWA cases].

Contain all matters relevant to disposition and recommendations, and placement. Qualified Expert Witness required.

Caveat: §361.5(b) bypass grounds.

Sideways

Disposition is hearing when case can go sideways.

Dispo Purpose

Disposition occurs once a child is found to be described in the ten §300 grounds.

Disposition follows the *person described* finding.

Dictionary vs. Court Definition: (1) Dictionary means the way in which something is placed or arranged, in relation to other things; (2) Juvenile Court it is either a sentencing (for delinquents) or a case plan and assessment of a family's deficiencies.

Purpose is to fix the family. This is the *most important* hearing for ICWA Advocates to participate in and offer input and evidence.

Disposition is a Final Judgment

Not every Juvenile Court ruling or hearing is appealable or considered as a final judgment

Disposition is Appealable

In re Isaiah W.

General Rule: Errors at Disposition must be appealed within 60 days or are forfeited.

Isaiah W. parent waited to raise an ICWA violation at the final hearing on Permanency.

Court treats ICWA differently and held that: (1) a parent may challenge a finding of ICWA's inapplicability in the course of appealing from a subsequent order terminating parental rights, even if the parent did not raise such a challenge in an appeal from the initial order; and (2) in this case, the fact that Mother did not allege ICWA notice error in an appeal from the original dispositional order did not preclude her from raising the claim in this appeal.

Sioux wants Fostra places with Extenda in Utah

At the Dispositional Hearing Sioux asks CPS to place her daughter with the Choctaw aunt and sibling in Utah.

The Agency has already placed Fostra with Bob & Sue DeFacto who love Fostra to pieces and felt an immediate bond.

When the Cherokee Tribe objected to Linquish being removed from the custodial aunt the Court allowed a return, but will not consider sending Fostra to Utah without a completed ICPC investigation, study, and approval.

Placement Preferences

Both tribes have now decided to intervene, and both tribes ask for placement of both girls in Utah with the Indian relative.

Buster objects, says he won't be able to reunify with Fostra.

Ensign objects and asks for full custody

What happens?

Order of Preference

ICWA has two tiers of preference, one for the front end of cases (foster care); and the second for the back end (adoptions) 25 U.S.C. §1915(b)

Placement Preferences incorporated into California's Welfare & Institutions Code. W&I §361.31(b).

Foster Care Order is: (1) Member of child's Extended Family (a defined term); (2) Foster Home licensed/approved by child's tribe; (3) Indian Foster Home licensed by non-Indian agency; (4) Institution for children approved by an Indian tribe, operated by Indian organization.

Court Maintains Status Quo

The Juvenile Court judge is concerned about Sioux's substance abuse and moving Fostra out of her school, and intends to follow the Agency recommendation to keep her with the DeFacto family for stability.

Linguish has been living in Utah and the judge believes she can return there, still intends to maintain jurisdiction over her and the aunt.

Wait!

Sioux objects: Says there is no good-cause to deviate from the placement preferences.

And—Sioux objects to the Agency making a foster care placement without the testimony of a Qualified Expert Witness.

The Agency says that Sioux has not proven she is an Indian, and that O'Brien doesn't sound like a Native American name to them.

Tribe Objects Too!

The Choctaw Tribe sends an ICWA Advocate to court and objects to the non-Indian placement of Foster with the DeFactos.

The Cherokee Tribe does not file paperwork, but sends a letter objecting to the removal of Linnish from her mother without an Expert Witness.

What should the court do?

Qualified Expert Witness

Foster Care Placement cannot be made with testimony that continued custody with the parent or Indian Custodian is likely to result in serious emotional or physical damage to the child. (§1912(e)-(f) and W&I §224.6(c)).

Expert

Cannot be an employee of the Agency (CPS). Must be independent, and not the social worker on the case or within the same county.

Must be available to testify in open court (Court practice is to request written report—sometimes called an Expert “letter” or Expert “declaration.”)

Must meet the legal criteria, including: being a member of the child’s tribe or community and is knowledgeable in family and child rearing practices; having substantial experience in delivery of services and is knowledgeable in prevailing social/cultural standards; or having substantial education and expertise in their specialty area.

Judge Adopts Case Plan Without Expert

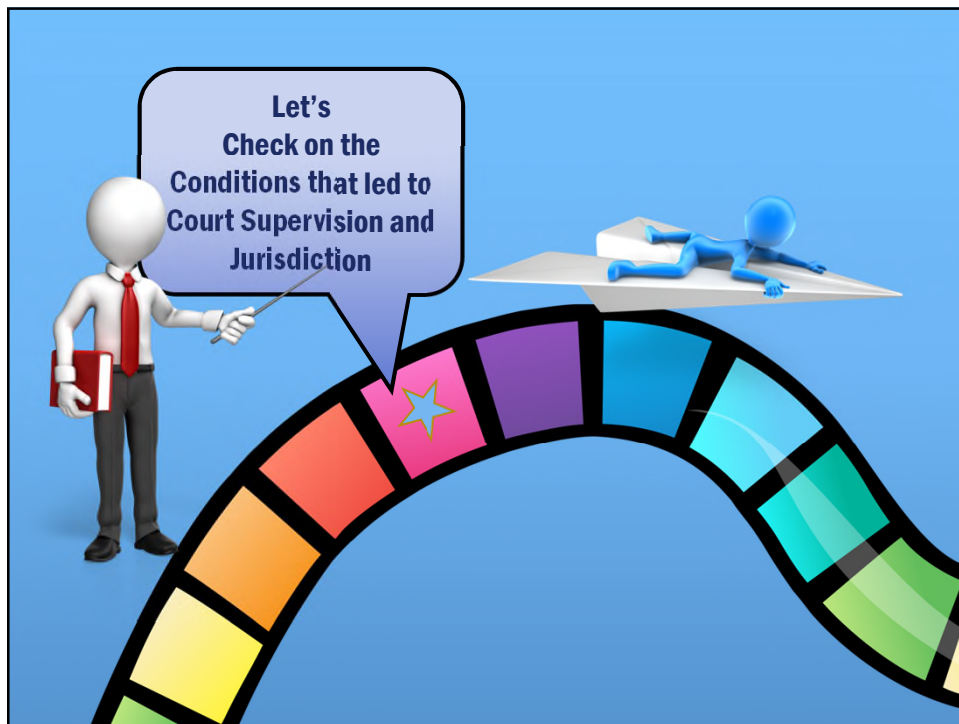
Given the time deadlines and the Agency's complaint that their funding is limited the Court makes Dispositional Orders without prejudice for any party to submit Expert Opinion at a later time.

The Agency argues that the judge does not need to apply ICWA at this time because no one has "proven" they are eligible or a member.

No one appeals, and the matter is set for a six-month review hearing.

Topic 5

Periodic Review Hearings



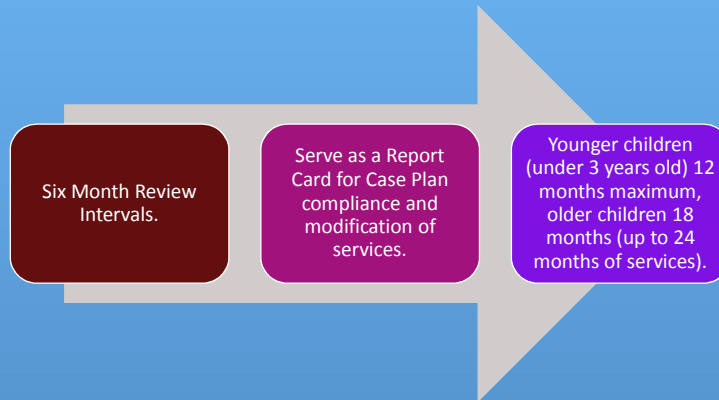
What is a Review Hearing?

How many Reviews are there?

How long can they last?

What is the court reviewing?

Periodic Review Hearings



Conduct of Hearing

A “Review Report” is due 10 days before every Review Hearing and should be served on all parties under W&I §364(b).

The report is essentially a supplemental report and should not restate all the record, but rather, focus on evidence whether the conditions that brought the children under the court’s jurisdiction still exist.

Also, the report should identify a likely date for return of the children to their parents or setting of a hearing on a permanent plan.

Detriment is a Continuing Factor

In addition to assessing progress with each parent (or Indian Custodian's) progress with their case plan, the under-current of the report is to assess detriment.

Specifically, the court must consider whether the return of the children to the parent's custody and control will create a substantial risk of detriment to the child (as defined in §366.21(e)(1)-(f)(1)).

Placement an Ongoing Issue

Placement is not a one-time decision, and must be reassessed by the court at every periodic review hearing.

If a court has placed an Indian child in a non-preference placement due to good cause, the ICWA Advocate or attorney should reargue that ruling whenever there is a change of facts.

Sioux's Circumstances Change

Sioux realizes that she does have a substance abuse problem and wants to place Fostra with her half-sister, Linqish in Utah until she can get better.

Buster never completes services, ignored his case plan and never visits Fostra.

Ensign Nada is deployed for Afghanistan, but did take a paternity test and was determined to be Linqish's father. He has met someone new in Afghanistan and does not want to pursue custody or a relationship with Linqish.

Sioux Files a §387 Petition

Section 387 of the Welfare & Institutions Code allows any party to file a motion, or petition to change a prior court order.

Sioux, as the mother of both girls claims her need for a longer rehabilitation program and the importance of the girls maintaining a sibling relationship requires the court to place Fostra with Aunt Extenda and Linqish in Utah.

Bob & Sue DeFacto Claim Bonding

Bob & Sue request, and are granted de facto parent status under CRC 5.534(e).

The DeFactos get legal counsel appointed and object to moving Fostra from their care and custody.

In addition the DeFactos object to the constitutionality of the ICWA and to applying its placement preferences based on equal protection.

Good Cause to Deviate

Section 361.3 requires a Court to consider the following factors in placing a child away from parents: (1) Best Interests of Child; (2) Wishes of Parent; (3) Placement of Siblings and Half-Siblings in same home, unless contrary to safety (4) Good moral character of the relative.

For Indian Children: Section 361.31 requires: (1) Least Restrictive Setting; (2) Member of Child's Extended Family; (3) or Indian Foster Home approved by tribe; (4) A Suitable Indian Tribe approved institution.

Judge Must Decide Placement

The issue before the Court is whether to change Fostra's placement before the final review hearing.

The Judge intends to grant Fostra's request, in part because neither father wants to be involved, and the girls have had an ongoing relationship, and would be placed with an Indian family member.

The Utah ICPC Office has approved Extenda's home.

How would you rule?

New Facts

Bob & Sue DeFacto hired an investigator who found a 25 year-old DUI conviction against Aunt Extenda that did not show up in her ICPC home study.

The DeFacto's allege that the Utah home study is defective. When the Choctaw Tribe approved the home, the DeFactos argued that the tribe cannot license a home off its reservation and must consider the DUI conviction as disqualifying

Court Ruling

The judge is persuaded by the DeFacto's argument and doesn't want to get overturned on appeal. He keeps Fostra placed with the DeFactos and sets the hearing for a 12-month Permanency Review Hearing.

Section 366.26

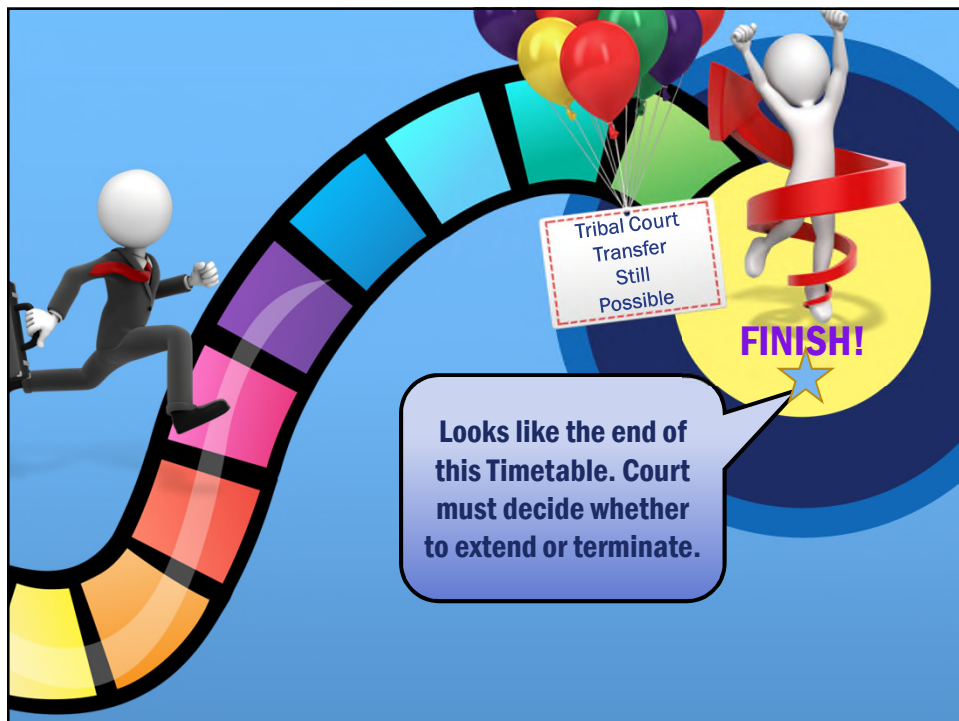
Anytime a parent or attorney hears the numbers *two-six*, they should be on alert. A "*26 hearing*" is the last set of hearings before parental rights are terminated.

Remember it imposes a *higher burden of proof*.

This is the fish or cut-bait hearing where the court is required to decide whether to return children to their parents or set the matter for another permanent plan, including adoption or guardianship.

Topic 6

Permanent Plans



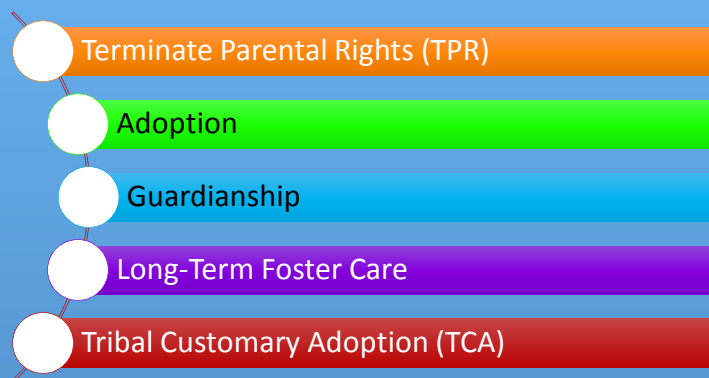
Selection & Implementation Hearing

Welfare & Institutions Code (and AFSA) compel permanency (§ 366.26).

Select a permanent plan for children: Return to parents, guardianship, adoption (termination of parental rights), customary adoption.

120 days to schedule hearing, second time expert witness is needed.

Permanency Options



Exceptions to Terminating Parental Rights

Before Parental Rights can be terminated the Court must decide whether to continue with services.

Don't confuse Termination of Services with Termination of Parental Rights.

Court must Select and Implement a Permanent Plan.

Section 366.26 sets out procedure, but it includes *exceptions* to Terminating Parental Rights.

Some of the Exceptions

- Likelihood of Adoption
- Beneficial Relationship with Parent
- Twelve or older child objects
- Substantial Interference with Sibling Relationship
- Indian Child interferes with child's tribal connection and membership rights

Qualified Expert Witness Required for Adoption

In addition to detriment finding for making a *foster care* placement at the beginning of the case, an Expert Witness is also required before an adoption can be ordered in a Dependency case.

Detriment finding required for adoption by Qualified Expert Witness (25 USC §1915)

Adoptive Placement Preferences apply (§1915(b)).

Resources

The Training Materials Include a Dependency Law Skills Handbook that covers Dependency procedure, citations and cases in more detail

In addition, the Courts publish a DOG Book.
http://www.courts.ca.gov/documents/Dogbook_2Ed_online.pdf that includes Checklists for Parents, Attorneys and Children.

Topic 7

Transfers to Tribal Court

Petition to Transfer

Child's Tribe can Petition for a transfer to Tribal Court at any stage of the proceedings.

Note: in the case of Sioux and Extenda the court should have made a ruling regarding the tribe of most significant contacts. However, if each girl was eligible for membership in different tribes the it is theoretically possible that both tribes could petition to transfer each minor's case.

Legal citation for transfers is 25 U.S.C. §1911(b); W&I §305.5 and CRC 5.483(d)(1).

Transfer is Sometimes Mandatory & Sometimes Presumptive

Time limits for *early stages* of proceedings have been relaxed by the new BIA Regulations (and updated Guidelines).

Section 305.5 and CRC 5.483 require transfer if child is a ward of tribal court or if child is domiciled or resides on Reservation of tribe with exclusive jurisdiction. Child's domicile follows custodial parent.

Presumptive transfers required unless *good cause* to deny transfer is found.

Circumstances to Deny

- 1) One or both Parent objects. Parental objection serves as an automatic veto. §1911 and W&I §305.5
- 2) Tribe does not have a Tribal Court or adjudicatory body as defined in §1903
- 3) Tribal Court denies Transfer
- 4) Good Cause to Deny
- 5) 12 year old (or more) objects

Good Cause

Good Cause can be based on hardship for witnesses or other parties if technological arrangements cannot be made.

Good Cause cannot include the perceived inadequacy of Tribal Court or tribal social institutions.

Previously the Court could find Good Cause if the case was at an “advanced stage,” but waiting until after reunification services have failed was not, in and of itself, sufficient.

Concerns that Tribal Court might modify a ruling or counsel will not be appointed for parties are an attack on the sufficiency of the court.

Topic 8

Procedural Issues

Membership

CRC 5.482 still requires the Agency to assist Indian children in obtaining membership or navigating the enrollment procedure.

Membership decisions still are exclusively decided by the tribe or tribes.

Court cannot substitute its judgment for the tribe and decide if a child's prognosis for membership is good.

Remember statutory language of §1903(4): Indian child either a *member*, or *eligible for membership and biological child of a member*.

Intervention

Intervention is not defined in the ICWA, though it is commonly referred to as if the intervener were a party.

Code of Civil Procedure §387 does define intervention as someone who has an *interest* in the litigation and can examine witnesses, file pleadings, and otherwise be deemed a party.

The ICWA allows tribes the right to *both* discovery and disclosure of documents. In the past issues arose when tribal representatives could not copy documents or be served when new papers were filed.

Best practice is to exert right to intervene (not request by motion) and include a demand for discovery in Notice of Intervention.

Higher Burden of Proof in ICWA Cases

What is a Burden of Proof?

A burden of proof is the obligation to provide evidence or other testimony to support a legal case or contention.

The burden is higher in ICWA cases.

There are different measurements for burdens of proof. Generally: Preponderance is 51%; Clear & Convincing 75%; and Beyond a Reasonable Doubt 98%. No exact mathematical formula.

Foster Care & TPR

Burden of Proof for Foster Care Placement (defined under Act) is Clear & Convincing.

Termination of Parental Rights: Beyond a Reasonable Doubt.

Both require testimony of a Qualified Expert Witness.

Active Efforts

Regular Dependency cases require the Agency to offer Reasonable Services designed to correct or remove the condition that led to removal or court supervision.

In ICWA cases the standard requires the Agency to demonstrate Active Efforts (higher) were made and provided remedial services and rehabilitative programs designed to prevent the break-up of the Indian family, and that they were unsuccessful.

Active Means Active

Older cases construing Active Efforts to be equivalent to Reasonable Efforts are inconsistent with Federal and California law.

Active Efforts is decided on a case-by-case basis.

Takes into account the prevailing social and cultural values of the Indian child's tribe.

Bypassing services to parents for prior (unsuccessful) cases is arguably a violation of Active Efforts.

Bypass of Services

The bypass list is long, and ever-growing, and is found in W&I §361.5.

Bypass usually occurs at Disposition, but it can be requested in Juris/Dispo Report, or even in a motion for early termination of services.

§361.5 is inconsistent with §361.7 (Active Efforts)

Invalidation

Invalidation is the doomsday remedy and is a reversal of the entire court case for violating the ICWA.

Not every violation causes invalidation, and not every party can raise invalidation.

Topic 9

Customary Adoption §366.24

Tribal Customary Adoption

A new permanency option that is more consistent with tribal beliefs and values

Allows for adoption of an Indian child *without* termination of parental rights

Instead of mandatory provisions of state law, TCA occurs according to tribal laws, customs, and traditions

Customary Adoption

Only available when the Tribe agrees

Only in dependency in California

Only available for children from federally-recognized tribes

Concurrent Permanency Track

Topic 10

BIA Regulations and Guidelines

1979 Guidelines have been updated and then were revised by Rulemaking

Bureau of Indian Affairs (BIA)
Issued Federal Rules on Indian
Child Welfare Act on June 14,
2016

BIA Rules (25 CFR 23) were effective on December 12, 2016.

Difference between federal rules and state law.

Pre-emption of state law by federal law.

Old Guidelines ('79) were updated, then superseded by new BIA Guidelines issued in December, 2016.

BIA Clarification Timeline

BIA issued ICWA regulations in 1979 & 1994;

BIA also addressed ICWA compliance in 1979 and 2015 Guidelines, updated again in 2016 to complement the regulations;

A final rule (25 CFR 23, 81 Fed. Register 38778) implemented the ICWA regulations that went into effect on December 12, 2016.

BIA Guidelines do not Trump California Law

But the BIA Regulations might.

Guidelines are persuasive authority, and federal agency is given deference.

But Rule Making—Federal Rules arguably pre-empt California's state law.

Identify inconsistencies between state law and federal law.

14 Main Areas Changed

One handout is a comparison between the state Welfare & Institutions Code, the Rules of Court, the Federal Rules and the BIA Guidelines.

Too voluminous to address in PowerPoint, but it is worth noting the topical areas that are affected. Fourteen main areas.

Subject Areas

- 1) Active Efforts
- 2) Application of Law
- 3) Consent
- 4) Delinquency Cases
- 5) Determination of Indian Status
- 6) Eligibility for more than one tribe
- 7) Emergency Proceedings

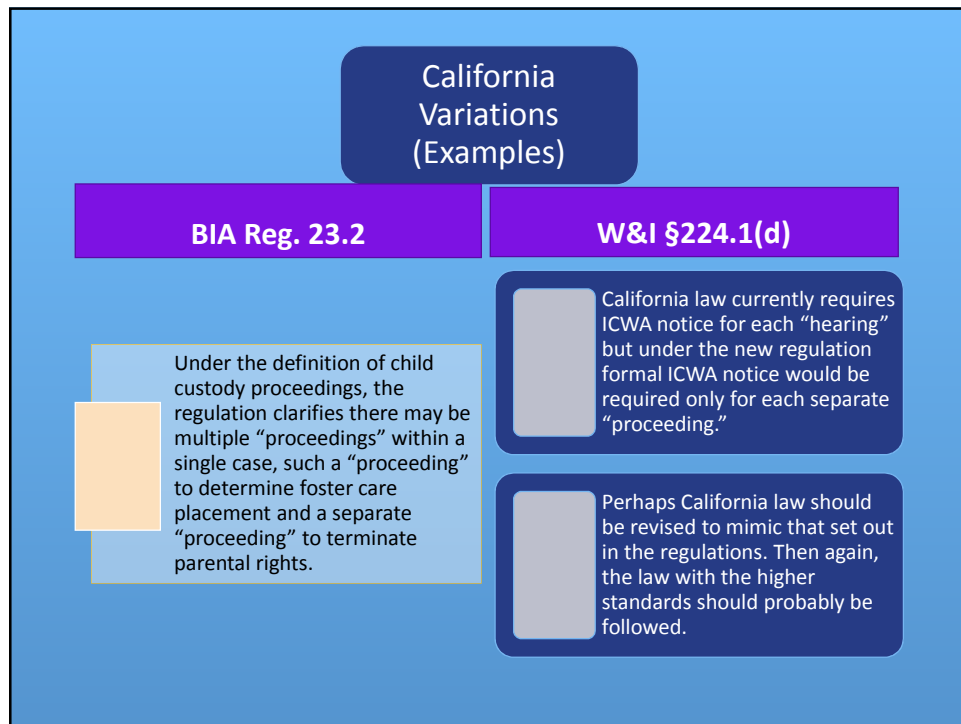
Areas Continued

- 8) Inquiry
- 9) Jurisdiction
- 10) Notice
- 11) Placement Preferences
- 12) Qualified Expert Witness
- 13) Transfer
- 14) Voluntary Proceedings

BIA Reg. 23.2 vs. W&I §361.7

The new regulations includes a definition of *active efforts* that gives 11 examples, including the following:

- Identifying appropriate services and helping parents overcome barriers including actively assisting parents in obtaining such services;
- Taking steps to keep siblings together whenever possible
- Identifying, notifying and inviting tribal reps to participate in providing support and services to Indian child's family and in family team meetings.
- States that what constitutes "active efforts" be assessed on a case by case basis but unlike BIA ICWA Regulation § 23.2, does not list examples.
- Similar social and cultural component
- California state law could be revised to more closely align with the new Regulation.



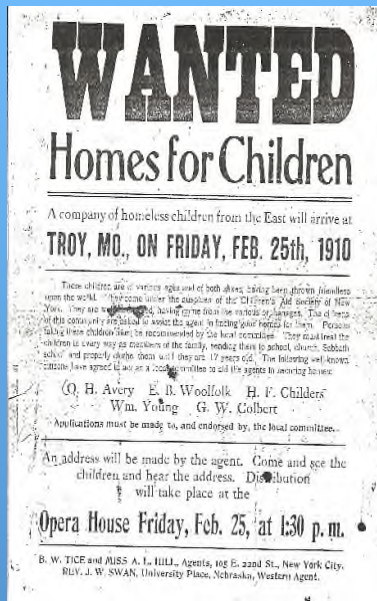
Open Discussion on Rules

Topic 11

History and Policy of ICWA

Protection of Children & Culture





Orphan Trains



Social Services and Protection of Children Arose out of the 1800s Orphan Trains

The Indian Child Welfare Act was the outgrowth of a federal movement to protect children

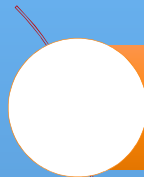
1854 to 1929

Between 1854 and 1929 between 150,000 to 200,000 children were shipped, paraded, and placed in wholesome, unimpooverished homes in the mid-west, often without their parents' knowledge or consent.

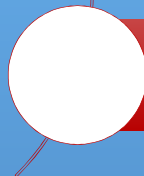


First Orphan Train left New York for Dowagiac, Michigan with 46 boys and girls between the ages of 10 and 12 years old.

Birth of Modern Licensed Foster Care

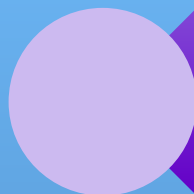


The practice of sending children away on orphan trains was seen as a modern, efficient way to take the surplus juvenile population from an overcrowded city. The children would be placed in decent Yankee homes where they could receive a proper upbringing.

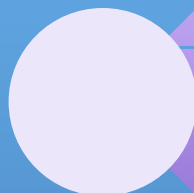


When public outrage curtailed the practice of involuntarily taking children from their parents, to uncertain homes, the birth of foster care licensing and social services oversight began.

Indian Children



In 1971 the BIA estimated that 35,000 Indian children were in Boarding Schools or placed away from their families.



Senator Abourezk of South Dakota testified in the April 1974 ICWA Congressional hearings that 25% of all Indian children were in foster care, adoptive home or boarding schools.

Foster Care Protections for Indian children – over 40 years after the last Orphan Train

Justification for removing Indian children from reservation: poverty; lack of spiritual structure; incubation of delinquency; illiteracy; failure to assimilate; were the same justifications used for the Orphan Train riders, except public policy stopped the exportation of non-Indians on the trains.

The Indian Child Welfare Act Hearings commenced in April of 1974, and became law in November of 1978.

The Act codified protections for Indian children

Indian Child Welfare Act Safeguards

The ICWA required:

Written Notice to Tribes & Ongoing Inquiry

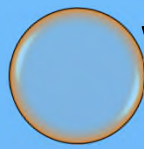
Right to Intervene *as a party*

Minimum Standards for Removal from Parents or Indian Custodian

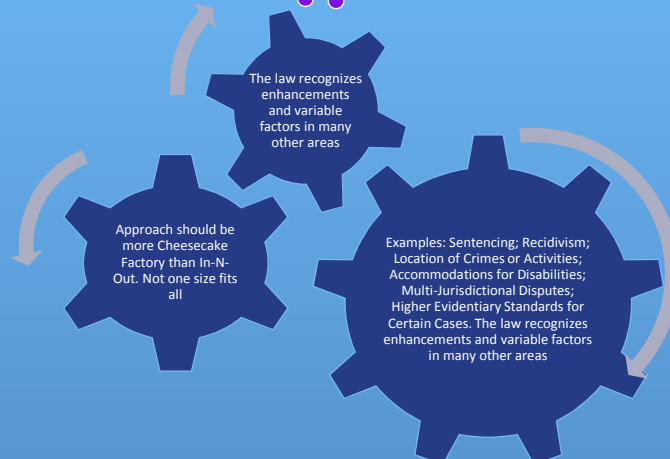
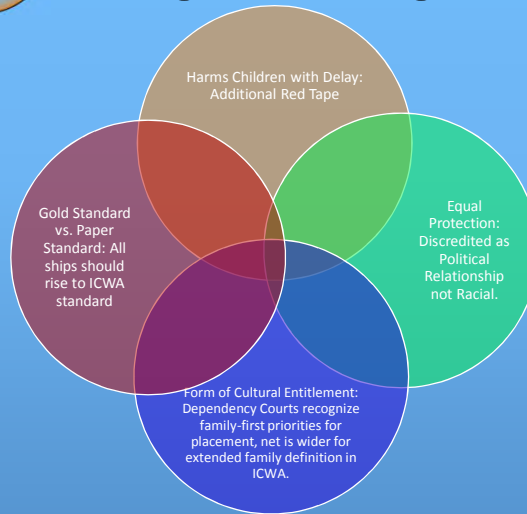
Higher Evidentiary Standard

Placement Preferences

Qualified Expert Witness



Why a Separate Standard? Arguments Against.



Topic 12

Roundtable Discussion and Problem Solving

Evaluations

Please take the next ten minutes to complete the evaluation form included in your handouts. This form will help us to improve our trainings and provide useful feedback that we will share with the California Department of Social Services to assist in the development of future trainings.





TRIBAL ICWA ADVOCATE TRAINING

ICWA Reference Guide & Checklists

Presented by Mark Radoff – CILS Senior Staff Attorney
Blake Atkerson – CILS Staff Attorney

I. DEMYSTIFYING THE JUVENILE DEPENDENCY SYSTEM

a. Governing Laws

- Federal legislation or statutes: Laws passed by Congress that apply to all of the 50 states.
 - United States Code (“U.S.C.”)
 - Indian Child Welfare Act (ICWA) or the Act means 25 U.S.C. 1901 et seq. (et seq. is a shorthand attorney abbreviation for *and what follows*. It is similar to etcetera).
 - Code of Federal Regulations. Regulations are rules passed by an Agency or Agencies to implement federal legislation (called statutes).
 - 25 C.F.R. §§ 23.11 – 23.13
- The Bureau of Indian Affairs (BIA) Guidelines for State Courts and Agencies in Indian Child Custody Proceedings

Provide standard procedures and best practices to be used in Indian child welfare proceedings in State courts.

Clarify minimum federal standards and that ICWA is to be liberally construed to the benefit of Indians.¹

The updated Guidelines issued on December 30, 2016 supersede and replace the 2015 Guidelines which superseded the former 1979 Guidelines (44 FR 67584). These BIA issued regulations implementing the ICWA, were effective December 12, 2016. The regulations have the force of federal law, and the Guidelines clarify any gray areas. Both the December 2016 Regulations and Guidelines should be applied in all state proceedings where the ICWA is effective. A detailed analysis of the new Regulations and Guidelines is beyond the scope of this Handbook.

Some courts have said that the Guidelines are not legally binding but California courts have stated that the Guidelines are entitled to “great weight.” There are no current cases on the effect of the BIA Regulations in California Dependency cases.

**** Federal regulations and new Guidelines have been published in the Code of Federal Regulations, and were effective December 12, 2016.*

The updated Guidelines can be found online at:

<https://www.federalregister.gov/documents/2016/12/30/2016-31726/guidelines-for-implementing-the-indian-child-welfare-act>. [Cited as 81 Federal. Register 96476]

<http://bia.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm>

- State legislation or statutes: Passed by the California Legislature and apply to all state court proceedings.

- Applicable Codes

The vast majority of statutes applicable to dependency cases are in California's Welfare and Institutions Code. Other codes which apply in certain situations include the Family Code, Probate Code, Evidence Code, and Code of Civil Procedure.

These codes can be found online at <http://www.leginfo.ca.gov/calaw.html> or <http://leginfo.legislature.ca.gov/faces/codes.xhtml>.

Applicable to juvenile dependency cases is the Welfare & Institutions Code §200-395; for juvenile delinquency is Welfare & Institutions Code §600 et seq.

- Case law: The courts' interpretations and applications of legislation, rules, and prior judicial decisions.
- Rules of Court: Rules adopted by the California Judicial Council to clarify or fill in gaps in legislation, or add procedural clarity, and which apply to all state courts in California. Rules of Court cannot contradict or override state legislation.

The Rules of Court can be accessed online at:

<http://www.courts.ca.gov/rules.htm>

- Local Rules of Court: There are special rules that counties make that apply only to the courts within its county. The rules do not contradict or override state legislation. They are just further interpretation of a state Code or Rule.
- All County Letters: Advisory opinions to social services agencies which do not have the force of law, but which can be binding on a social worker or the Agency because it is their own legal interpretation.

b. Court System

- Supreme Court = The Supreme Court of California is the state's highest court. Its decisions are binding on all other California courts. It has the authority to review decisions of the state Courts of Appeal. This reviewing power enables the Supreme Court to decide important legal questions and to maintain uniformity in the law.
- Courts of Appeal = have appellate jurisdiction. California has six appellate districts (three of which have multiple divisions)
- Superior Courts = trial jurisdiction over all criminal and civil cases.

The state court that will have jurisdiction (authority) in your juvenile case will be the court in the county:

- In which the child resides;

“Resides” = The residence of the parent with whom a child maintains his or her place of abode or the residence of any individual who has been appointed legal guardian or the individual who has been given the care or custody by a court of competent jurisdiction, determines the residence of the child. Welf. & Inst. Code §17.1(a)
- In which the child is found; or
- In which the acts take place or the circumstances exist that are alleged to bring the child within the provisions of Welf. & Inst. Code §§300 or 601 or 602.²

Printable Court Maps can be accessed online at <http://www.courts.ca.gov/12267.htm>

You can also locate the court house for your case at <http://www.courts.ca.gov/find-my-court.htm>

c. Child Welfare Generally

- Parents have a constitutional right to the care, custody, and control of their children.
- These rights are subject to limitation. States have power to intervene in the family for reasons specified under the law. = “Jurisdiction”

d. Jurisdiction

➤ “Jurisdiction”

In determining whether a court has jurisdiction, the Courts ask three questions:

1. Does the court have authority over the subject matter of the case?

The Juvenile Court has the authority to hear matters relating to the abuse and neglect of children.
2. Does the court have authority over the persons?

The court will have authority over the persons if the child is found to be described by one or more of the provisions of Welfare and Institutions Code § 300(a)-(j).
3. Has it been sufficiently proved that the child does in fact fall under one of the recognized grounds for jurisdiction?

The court must find by a preponderance of evidence that the child is described by one or more of the provisions of Welfare and Institutions Code § 300(a)-(j). (“Preponderance of evidence” means more likely than not – in other words, more than 50% likely.)

➤ “Subject Matter” Jurisdiction

² Cal. Rules of Court, rule 5.510; Welf. & Inst. Code §§327, 651

- In California, these reasons are listed under Welfare and Institutions Code §§ 300 et seq. (for dependents) or 600 et seq. (for delinquency).
- “Dependency” or “juvenile dependency” is the area of law involving children who are or may be at risk of abuse or neglect.
- Differences Between Children’s Cases and Other Cases
 - Paramount concern is always the best interests of the child
 - Confidentiality of proceedings
 - Court’s Exclusive Jurisdiction Over All Issues Relating to The Child’s Custody
- Unlike in Family Court, the focus is not resolving disputes between the parents. Rather the orders will be based on the protection and best interests of the child, which may affect the parents’ relationship and custodial rights.
- The Juvenile Court judge will not hear consider any family law dispute (including child support disputes and/or divorce matters), although provisions can be made in Juvenile Court for the county to be reimbursed for legal services or other placement related costs.
- “Personal” Jurisdiction
 - Regardless of the child’s residence or domicile, where an Indian child is a *ward of a tribal court*, the Indian tribe shall retain exclusive jurisdiction.³
 - In California, “An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who *resides or is domiciled within the reservation of such tribe*, except where such jurisdiction is otherwise vested in the State by existing federal law” [PL 280]⁴
 - Where the tribe has exclusive jurisdiction over a matter, the state court has no jurisdiction to hear the matter and must transfer the proceeding to tribal court.⁵
 - In California through a combination of P.L. 280 and the ICWA, California tribes and the state share concurrent jurisdiction over child welfare cases. This means that either the state or the tribe may acquire valid initial jurisdiction in child dependency cases, even where a child is domiciled or resides on the reservation.
 - Where the child’s residence or domicile is not on the reservation, PL-280 does not apply. However, the ICWA may divest the state court of dependency jurisdiction, in that the tribe has “referral jurisdiction,”⁶ and “on the petition of either parent, the Indian custodian, or the

³ 25 U.S.C. § 1911(a)

⁴ 25 U.S.C. § 1911(a)

⁵ 25 U.S.C. §§ 1911(a), 1922; Welf. & Inst. Code § 305.5(a); Cal. Rules of Court, rule 5.483(a)

⁶ 25 U.S.C. § 1911(b)

Indian child's tribe, in the absence of good cause to the contrary and absent objection by either parent, must transfer (i.e., "refer") such a proceeding to the jurisdiction of the tribe. ⁷

- A Tribe may reassume exclusive jurisdiction over child custody proceedings

e. Emergency Removal

- The state can remove a child *temporarily* located off the reservation in order to prevent imminent physical damage or harm to the child –such as in an “emergency.” ⁸
- “Emergency removal” = Where the removal is needed to prevent *imminent physical damage or harm* to the child.⁹
- ▶ Active Efforts must be shown. Active Efforts is a *defined* term and has a particular meaning under the ICWA.
- ▶ If the court finds that the Indian child was improperly removed or retained, the court must:
 - terminate the proceeding
 - and
 - the child must be returned immediately to his or her parents or Indian custodian.

Exception - If it can be shown that returning the child to his parent or custodian would subject the child to imminent physical damage or harm. ¹⁰

- ▶ Any emergency removal or emergency placement of any Indian child under state law must *be as short as possible*.

Each involved agency or court must:

- Diligently investigate and document whether the removal or placement is proper and continues to be necessary to prevent imminent physical damage or harm to the child;
 - Promptly hold a hearing to hear evidence and evaluate whether the removal or placement continues to be necessary whenever new information is received or assertions are made that the emergency situation has ended; and
 - Immediately terminate the emergency removal or placement once the court possesses sufficient evidence to determine that the emergency has ended.
- ▶ If the agency that conducts an emergency removal of a child whom the agency knows or has reason to know is an Indian child, the agency must:
 - Treat the child as an Indian child until the court determines that the child is not an Indian child;

⁷ 25 U.S.C. § 1911(b)

⁸ 25 U.S.C. §§ 1922

⁹ 25 U.S.C. § 1922

¹⁰ 25 U.S.C. § 1920; Welf. & Inst. Code § 305.5(e)

- Conduct active efforts to prevent the breakup of the Indian family as early as possible, including, if possible, before removal of the child;
 - Immediately take and document all practical steps to confirm whether the child is an Indian child and to verify the Indian child's tribe;
 - Immediately notify the child's parents or Indian custodians and Indian tribe of the removal of the child;
 - Take all practical steps to notify the child's parents or Indian custodians and Indian tribe about any hearings regarding the emergency removal or emergency placement of the child; and
 - Maintain records that detail the steps taken to provide any required notifications.
- ▶ In California notice of the removal to the tribe must be done *no later than the next court day*.
 - ▶ If the tribe determines that the child is an Indian child, the state or local authority must transfer the child custody proceeding to the tribe within 24 hours after receipt of written notice from the tribe of that determination.¹¹
 - ▶ Temporary emergency custody should not be continued for more than 30 days, unless:
 - A hearing, noticed in accordance with the Guidelines, is held and results in a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness; or
 - Extraordinary circumstances exist.

II. INDIAN CHILD WELFARE ACT (ICWA)

a. OVERVIEW OF ICWA

i. Purpose and History

- ICWA is simply one aspect of Dependency, and is best understood as a part of the Dependency system.
- Congress passed the ICWA in 1978 to counteract frequent misuse of state dependency proceedings which resulted in widespread removal of Indian children from their families. Prior to its passage, there were no specific protections for Indian children and no uniformity between states, particularly when it came to non-Indian placements.
- The ICWA fulfills an important aspect of the federal government's trust responsibility to tribes by protecting and preserving the bond between Indian children and their tribe.
- ICWA establishes minimum standards, and states are free to adopt more stringent laws for Indian children. California did so in 2006, when it codified much of the ICWA into state law with Senate Bill 678 (a.k.a. "Cal-ICWA"). Similarly in 2010 California added a new permanency option for Indian children called Tribal Customary Adoption ("TCA").

¹¹ Welf. & Inst. Code § 305.5(a)

ii. When Does ICWA Apply?

- ICWA applies whenever an Indian child is the subject of a state “child custody” proceeding as defined by the Act.
- ICWA applies whether or not a tribe formally intervenes in a case.
- What is a “child custody” proceeding?

Under the ICWA:

“Child custody proceeding” shall mean and include—

- (i) “foster care placement” which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
- (ii) “termination of parental rights” which shall mean any action resulting in the termination of the parent-child relationship;
- (iii) “preadoptive placement” which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
- (iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.”¹²

In California, ICWA applies to:

- (1) Proceedings under Welfare and Institutions Code section 300 et seq.;
- (2) Proceedings under Welfare and Institutions Code sections 601 and 602 et seq., whenever the child is either in foster care or at risk of entering foster care. In these proceedings, inquiry is required in accordance with rule 5.481(a). The other requirements of this chapter contained in rules 5.481 through 5.487 apply only if:

(A) The court's jurisdiction is based on conduct that would not be criminal if the child were 18 years of age or over;

(B) The court has found that placement outside the home of the parent or legal guardian is based entirely on harmful conditions within the child's home. Without a specific finding, it is presumed that placement outside the home is based at least in part on the child's criminal conduct, and this chapter shall not apply; or

(C) The court is setting a hearing to terminate parental rights of the child's parents.

- (3) Proceedings under Family Code section 3041;

- (4) Proceedings under the Family Code resulting in adoption or termination of parental rights; and

- (5) Proceedings listed in Probate Code section 1459.5 and rule 7.1015.¹³

¹² 25 U.S.C. § 1903(1);

¹³ Cal. Rules of Court, rule 5.480

iii. When ICWA Does Not Apply?

➤ ICWA does not apply to:

- Tribal court proceedings (unless a tribe has incorporated the federal law or adopted its own version of the ICWA);
- Placements based upon an act by the Indian child which, if committed by an adult, would be deemed a criminal offense;
- In a divorce case or custodial dispute between non-married partners, a custody award of the Indian child to either parent is excluded from the ICWA;
- Voluntary placements that do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.
 - Voluntary placements in which a parent consents to a foster care placement or seeks to permanently terminate his or her rights or to place the child in a preadoptive or adoptive placement are covered.
 - California Rules of Court regarding ICWA do not apply to *voluntary foster care* and *guardianship* placements where the child can be returned to the parent or Indian custodian on demand.¹⁴

iv. KEY TERMS

- “Indian” means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 43 C.F.R. § 1606. ¹⁵
- “Indian tribe” = any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians because of their status as Indians, including any Alaska Native village as defined in 43 U.S.C. 1602(c). ¹⁶
- An “Indian child” is defined as:

“Any unmarried person who is under age eighteen and is either: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4); Welf. & Inst. Code § 224.1; Cal. Rules of Court, rule 5.502(19)

The tribe has the definitive word on whether a child is or is not a member. Its determination is conclusive on the state court.

- “Parent” means any *biological* parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.

¹⁴ Cal. Rules of Court, rule 5.480

¹⁵ 25 U.S.C. § 1903(3);

¹⁶ 25 U.S.C. § 1903(8);

- “Indian custodian” means any person who has legal custody of an Indian child under tribal law or custom or under State law, whichever is more favorable to the rights of the parent, or to whom temporary physical care, custody, and control has been transferred by the parent of such child.
- “Extended family member” is defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, is a person who has reached the age of eighteen and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.
- “Indian child's tribe” =

If the tribes are able to reach an agreement, the agreed upon tribe should be designated as the Indian child's tribe.

If the tribes do not agree, the court must make that determination as follows:

- If the Indian child is or becomes a member of only one tribe, that tribe shall be designated as the Indian child’s tribe, even though the child is eligible for membership in another tribe.
- If an Indian child is or becomes a member of more than one tribe, or is not a member of any tribe but is eligible for membership in more than one tribe, the tribe with which the child has the more significant contacts shall be designated as the Indian child’s tribe.

“More significant contacts” – In making this determination, the court shall consider, among other things, the following factors:

- The length of residence on or near the reservation of each tribe and frequency of contact with each tribe.
- The child’s participation in activities of each tribe.
- The child’s fluency in the language of each tribe.
- Whether there has been a previous adjudication with respect to the child by a court of one of the tribes.
- Residence on or near one of the tribes’ reservations by the child parents, Indian custodian or extended family members.
- Tribal membership of custodial parent or Indian custodian.
- Interest asserted by each tribe in response to the notice specified in Welfare and Institutions Code § 224.2.
- The child’s self-identification.¹⁷

If the child is eligible but not yet a member of a tribe, the agency should take the steps necessary to obtain membership for the child in the tribe that is designated as the Indian child's tribe, but is not required to do so under Abigail A. until *after* finding is made that the ICWA applies.

¹⁷ 25 U.S.C. 1903(5); Welf. & Inst. Code § 224.1

Once the child is or becomes a member of only one tribe, that tribe must be designated as the Indian child's tribe, even though the child is eligible for membership in another tribe.¹⁸

The court is required to state its determination, and the reasons for it, in writing.¹⁹

All tribes which received notice of the child custody proceeding must be notified in writing of the determination and a copy of that document must be filed with the court and sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.

- Tribal court means a court with jurisdiction over child custody proceedings, including a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe vested with authority over child custody proceedings.
- Reservation means Indian country as defined in 18 U.S.C 1151, including any lands, title to which is held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.
- Imminent physical damage or harm means present or impending risk of serious bodily injury or death that will result in severe harm if safety intervention does not occur.
- Active efforts are intended primarily to maintain and reunite an Indian child with his or her family or tribal community.
- Continued custody means physical and/or legal custody that a parent already has or had at any point in the past. The biological mother of a child has had custody of a child.
- Custody means physical and/or legal custody under any applicable tribal law or tribal custom or State law. A party may demonstrate the existence of custody by looking to tribal law or tribal custom or state law.
- Voluntary placement means a placement that either parent has, of his or her free will, chosen for the Indian child, including private adoptions.
- Upon demand means that the parent or Indian custodians can regain custody simply upon request, without any contingencies such as repaying the child's expenses.

b. NOTICE AND INQUIRY

i. Legal Background

- Notice and inquiry provisions are critical components of serving the Congressional and state legislature's goal of preserving tribes and Indian families.²⁰
- Inquiry
 - ▶ Agencies/courts must ask whether there is reason to believe a child that is subject to a child custody proceeding is an Indian child.

¹⁸ Welf. & Inst. Code § 224.1(e)(1)

¹⁹ Welf. & Inst. Code § 224.1(d)

²⁰ 25 U.S.C. 1901, 1902; Welf. & Inst. Code § 224

- ▶ Court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify membership.

➤ Notice

- ▶ Notice must be to all tribes in which the child may be a member or eligible for membership until the court makes a determination as to which tribe will be designated as the “Indian child’s tribe.”

*** Remember, notice ensures that tribes will be afforded the chance to assert their rights under the ICWA. ***

ii. Inquiry

i. What is “a reason to believe” the child is or may be an Indian child?

- The BIA Guidelines provides that “an agency or court has reason to believe that a child involved in a child custody proceeding is an Indian child if:
 - (1) Any party to the proceeding, Indian tribe, Indian organization or public or private agency informs the agency or court that the child is an Indian child;
 - (2) Any agency involved in child protection services or family support has discovered information suggesting that the child is an Indian child;
 - (3) The child who is the subject of the proceeding gives the agency or court reason to believe he or she is an Indian child;
 - (4) The domicile or residence of the child, parents, or the Indian custodian is known by the agency or court to be, or is shown to be, on an Indian reservation or in a predominantly Indian community; or
 - (5) An employee of the agency or officer of the court involved in the proceeding has knowledge that the child may be an Indian child.”
- The Welfare and Institutions Code adds that “a reason to believe that a child may be known to be an Indian child” exists if: “(1) ... or one or more of the child’s biological parents, grandparents, or great-grandparents are or were a member of a tribe.” ²¹
- Similarly, the California Rules of Court provide the following considerations
 - “ (A) The child or a person having an interest in the child, including an Indian tribe, an Indian organization, an officer of the court, a public or private agency, or a member of the child's extended family, informs or otherwise provides information suggesting that the child is an Indian child to the court, the county welfare agency, the probation department, the licensed adoption agency or adoption service provider, the investigator, the petitioner, or any appointed guardian or conservator;
 - (B) The residence or domicile of the child, the child's parents, or an Indian custodian is or was in a predominantly Indian community; or
 - (C) The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the U.S.

²¹ See, Welf and Inst. Code §224.3(b)

- The BIA Guidelines provide that the
 - The court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify whether the child is in fact a member or eligible for membership in any tribe.
 - The agency must get verification, in writing, from all tribes in which it is believed that the child is a member or eligible for membership, as to whether the child is an Indian child.

ii. How Is Inquiry Made?

- The duty under this obligation belongs to the court, the county welfare department, probation department, licensed adoption agency, adoption service provider, investigator, petitioner, and appointed guardian or conservator of the person, and appointed fiduciary.²³
- California Rules of Court provide that inquiry is made by:
 - “(A) Interviewing the parents, Indian custodian, and "extended family members" as defined in 25 United States Code sections 1901 and 1903(2), to gather the information listed in Welfare and Institutions Code section 224.2(a)(5), Family Code section 180(b)(5), or Probate Code section 1460.2(b)(5), which is required to complete the Notice of Child Custody Proceeding for Indian Child (form ICWA-030);
 - (B) Contacting the Bureau of Indian Affairs and the California Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership; and
 - (C) Contacting the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility.”²⁴
- The department must complete the Indian Child Inquiry attachment (ICWA-010) and attach it to the petition.²⁵
- Then at the first court appearance by a parent, Indian custodian, or guardian, the court must order that the parents complete an ICWA-020 form.²⁶
- If no parent appears at the first hearing, or is unavailable to the initiation of the proceeding, the court *must* order the department to use *reasonable diligence* to find a parent, Indian custodian, or guardian in order to have Parental Notification of Indian Status (form ICWA-020) completed.²⁷
- It is from that information that the court must render the required notice using ICWA-030; Notice JV-135 as required by Welfare and Institutions Code §224.2.
- The duty to inquire about a child’s Indian status is affirmative and continuing.²⁸

²² Welf. & Inst. Code § 224.3(b); Cal. Rules of Court, rule 5.481(a)(5)(A)-(C)

²³ Cal. Rules of Court, rule 5.481(a))

²⁴ Cal. Rules of Court, rule 5.481(a)(4)

²⁵ Cal. Rules of Court, rule 5.481(a)(1)

²⁶ Cal. Rules of Court, rule 5.481(a)(2)

²⁷ Cal. Rules of Court, rule 5.481(a)(2)-(3)

²⁸ Welf. & Inst. Code §224.3(a); Cal. Rules of Court, rule 5.481(a)

- A parent's silence on the issue and/or murky information does not waive the court's affirmative duty to inquire.²⁹
- The showing required to trigger the statutory notice provisions is minimal. [Welf. & Inst. § 224.3(b)] Some cases have held that even a hint may suffice for this minimal showing."³⁰
- At a minimum, a conflict in the evidence exists which gives rise to a duty of further inquiry by the social worker and by the juvenile court.³¹

iii. Notice

- Once a social worker retains a child that "the court knows or has reason to know" is an Indian child, notice of detention must be provided to the Indian guardian and the tribe or to the Bureau of Indian Affairs if the tribe cannot be ascertained.³²
- Notice must be to all tribes to which the child may be a member or eligible for membership until the court makes a determination as to which tribe is the child's tribe.
- The notice is supposed to be sent to the chairperson, unless the tribe designates another agent.³³
- The tribe can designate "by resolution, or by such other form as the tribe's constitution or current practice requires, an agent for service of notice other than the tribal chairman and send a copy of the designation to the Secretary or his/her designee. The Secretary or his/her designee shall update and publish as necessary the names and addresses of the designated agents in the Federal Register. A current listing of such agents shall be available through the area offices."³⁴
- To be clear, a copy of all notice(s) must always be sent to the BIA in all cases subject to the Act.³⁵ This provision however, is separate and distinct from the requirements for rendering substituted service.
- There must be documentation of the compliance in that the original or a copy of each notice sent and any return receipts *and responses received*, must be filed with the juvenile court.³⁶
- Duty is continuing and ongoing³⁷
- Content Requirements for the Notice

- ▶ The Welfare and Institutions Code provides that notice must include the following:

“(A) The name, birthdate, and birthplace of the Indian child, if known.

(B) The name of the Indian tribe in which the child is a member or may be eligible for membership, if known.

²⁹ See, *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165-1168, where the court cannot discern whether father meant to convey that while he was not a registered member of a Cherokee tribe, his own father was registered.

³⁰ *In re D. C.* (2015) 243 Cal.App.4th 41, 61, citing *In re Miguel E.* (2004) 120 Cal.App.4th 521, 549 (emphasis added).

³¹ Welf. & Inst. Code § 224.3(a), (c); Cal. Rules of Court, rule 5.481(a)

³² 25 U.S.C. § 1912; See, 25 C.F.R. § 23.11; Welf. & Inst. Code § 224.2, 290.1(f)

³³ Welf. & Inst. Code § 224.2(a)(2); Cal. Rules of Court, rule 5.481(b)(4)

³⁴ 25 C.F.R. § 23.12

³⁵ 25 C.F.R. § 23.11(a)

³⁶; Welf. & Inst. Code § 224.2(c); Cal. Rules of Court, rule 5.482(b)

³⁷ See Welf. & Inst. Code § 224.3(d), (f); Cal. Rules of Court, rule 5.481(b); Welf. & Inst. Code § 224.3(f)

(C) All names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.

(D) A copy of the petition by which the proceeding was initiated.

(E) A copy of the child's birth certificate, if available.

(F) The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.

(G) A statement of the following:

(i) The absolute right of the child's parents, Indian custodians, and tribe to intervene in the proceeding.

(ii) The right of the child's parents, Indian custodians, and tribe to petition the court to transfer the proceeding to the tribal court of the Indian child's tribe, absent objection by either parent and subject to declination by the tribal court.

(iii) The right of the child's parents, Indian custodians, and tribe to, upon request, be granted up to an additional 20 days from the receipt of the notice to prepare for the proceeding.

(iv) The potential legal consequences of the proceedings on the future custodial and parental rights of the child's parents or Indian custodians.

(v) That if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent the parents or Indian custodians.

(vi) That the information contained in the notice, petition, pleading, and other court documents is confidential, so any person or entity notified shall maintain the confidentiality of the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's rights under the Act.

➤ If the identity or location of the parent or Indian custodian or the tribe cannot be determined, notice must be sent to the specified office of the Bureau of Indian Affairs. (For California that is the Sacramento office).

▶ The BIA has 15 days to provide notice as required.

▶ If, after a reasonable time following the sending of notice, but in no event less than 60 days, no determinative response to the notice is received, the court may determine that ICWA does not apply to the case unless further evidence of the applicability of the Act is later received.³⁸

³⁸ Cal. Rules of Court rule 5.664.

- ▶ No proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the BIA. Upon request of the parent, Indian custodian, or the tribe, the court must grant up to 20 additional days to prepare for that proceeding.³⁹

c. TRANSFER TO TRIBAL COURT

i. Legal Background

- If the tribe has exclusive jurisdiction, transfer is mandatory.
- ICWA provides an expansive definition of a “tribal court,” which includes a court established under the code or custom of an Indian tribe or any other administrative body of a tribe which is vested with authority over child custody proceedings.⁴⁰
- The scope of that definition includes a tribal council, or in the case of some California tribes, consortium courts. It is not limited to the traditional state definition of a “court.”
- This means that so long as the tribe has designated some adjudicatory body to preside over such cases, a transfer is appropriate.
- If the tribal court and state court have concurrent jurisdiction, transfer is presumed = “Transfer jurisdiction”
 - ▶ Presumption is that upon petition by the tribe, either parent or the Indian custodian, the state court must transfer the proceeding to the tribal court unless:
 - i. Either parent objects
 - or
 - ii. There is good cause not to transfer.⁴¹

Mandatory denial:

- The child's tribe does not have a "tribal court" or any other administrative body as defined in section 1903 of the Indian Child Welfare Act: "a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings;" or
- The tribal court of the child's tribe declines the transfer.⁴²

Denial is discretionary:

Although ICWA does not define “good cause”, California state law lists the following circumstances may constitute discretionary good cause to deny a request to transfer:

³⁹ Welf. & Inst. Code § 224.2 (d).

⁴⁰ 25 U.S.C. § 1903(12)

⁴¹ 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(b); Cal. Rules of Court, rule 5.483(b).

⁴² Cal. Rules of Court, rule 5.483(d)(1); Welf. & Inst. Code § 305.5

- Hardship caused by transferring the case to tribal court.

In other words, if the court can find that the evidence necessary to decide the case cannot be presented in the tribal court without undue hardship to the parties or the witnesses

and

The tribal court is unable to mitigate the hardship.

The court will look at whether it can

- make arrangements to receive and consider the evidence or testimony by use of remote communication,

or
- hear the evidence or testimony at a location convenient to the parties or witnesses,

or
- use other means permitted in the tribal court's rules of evidence or discovery
- The Indian child is over 12 years of age and objects to the transfer;

or
- The parents of a child over five years of age are not available and the child has had little or no contact with his or her tribe or members of the child's tribe.
- *Unreasonable delay* in requesting transfer

The court will consider whether there proceeding was at an advanced stage when the request to transfer was received

and

the petitioner did not make the request within a reasonable time after receiving notice of the proceeding⁴³

► Court may not consider:

- Whether or not the case is at an advanced stage (per new BIA Guidelines – not binding);
- The Indian child's contacts with the tribe or reservation;
- Socio-economic conditions or any perceived inadequacy of the tribal or BIA social services or judicial systems; or
- The tribal court's prospective placement ⁴⁴

⁴³ Cal. Rules of Court, rule 5.483(d)(2)

⁴⁴ Cal. Rules of Court, rule 5.483(e)

ii. Process and How to Request

- A petition to transfer jurisdiction may be submitted at any time during the proceeding.
- If it appears there is good cause to deny a transfer, the court must hold an evidentiary hearing on the transfer and make its findings on the record. ⁴⁵
- The burden of establishing good cause is on the party opposing the transfer. ⁴⁶
- Tribal court must be properly notified of the request
- A tribal court may decline to accept a transfer of jurisdiction. ⁴⁷
- For that reason, tribal court has to have accepted the case in order for the transfer to finalize
- The state court must receive proof of acceptance by the tribal court before dismissing the proceeding or terminating jurisdiction. ⁴⁸
- If the tribal court declines to accept transfer of the proceeding, the state court retains jurisdiction. ⁴⁹
- Any appeal to the transfer order must be made before the transfer to tribal jurisdiction is finalized. ⁵⁰ This means, you must ask for the “matter to be stayed” so that the order does not go into effect for that amount of time allowing you time to file the Notice of Appeal.
- Order For The Transfer

If the state court transfers the proceeding, it should make an order transferring the physical custody of the child to a designated tribal court representative. ⁵¹

The court must issue its final order on the Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction (form ICWA-060).

- After transfer occurs the court must proceed as follows:
 - If the court has received proof that the tribal court has accepted the transfer of jurisdiction, the court must dismiss or terminate jurisdiction
 - and
 - The court then makes an order transferring the physical custody of the child to a designated representative of the tribal court (not necessarily the same "designated representative" identified in the Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child (form ICWA-040));
 - and

⁴⁵ Cal. Rules of Court, rule 5.483(d)(3)

⁴⁶ Welf. & Inst. Code § 305.5(c)(4); see Cal. Rules of Court, rule 5.483(f)(1)

⁴⁷ 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(c)(1)(C); Cal. Rules of Court, rule 5.483(d)(1)(C)

⁴⁸ Welf. & Inst. Code § 305.5(b)

⁴⁹ 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(c)(1)(C)

⁵⁰ Cal. Rules of Court, rule 5.483(h)

⁵¹ Cal. Rules of Court, rule 5.483(h)

- Then include in the Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction (form ICWA-060) all contact information for the designated tribal court representative.⁵²

d. INTERVENTION

i. Legal Background

- The child's tribe has an absolute right to intervene under both state and federal law.⁵³
- This right can be invoked at any time, even if for the first time on appeal. ⁵⁴
- As an intervening party, the tribe is entitled to all rights afforded to any party in a proceeding, including the right to sit at the counsel table, the right to examine witnesses, and the right to be given copies of documents. ⁵⁵

ii. Process to Request

- The tribe may appear by counsel or by a representative of the tribe designated by the tribe to intervene on its behalf. ⁵⁶ The Indian child's tribe and Indian custodian may intervene through counsel or by a designated representative.
- It can be done orally or in writing. ⁵⁷
- Two forms:
 - ▶ Notice of Intervention – State Form- “ICWA-040 -- Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child”

A fillable form can be accessed online at

<http://www.courts.ca.gov/documents/icwa040.pdf>.

The tribe and/or Indian custodian *may, but are not required to*, utilize this form. ⁵⁸

- ▶ Notice of Intervention – Attorney Pleading

Many attorneys use customized pleadings for intervention and other purposes. Only when the Judicial Council designates a form as mandatory is a particular form required to be filed. An attorney-drafted pleading or notice may include written authentication stating the representative's name and the verification that the representative is authorized to appear pursuant to an official act of the tribe (tribal resolution or other document evidencing an

⁵² Cal. Rules of Court, rule 5.483(i)

⁵³ 25 U.S.C. § 1911(c); Welf. & Inst. Code § 224.4.

⁵⁴ 25 U.S.C. § 1911(c); Fam. Code § 177(a); Prob. Code § 1459.5(b); Welf. & Inst. Code § 224.4; Cal. Rules of Court, rule 5.482(e)

⁵⁵ See Code of Civ. Proc. § 387; see also Cal. Rules of Court, rule 5.482(e) and Judicial Council form ICWA-040

⁵⁶ Cal. Rules of Court, rule 5.534(i)

⁵⁷ Cal. Rules of Court, rule 5.534(i)

⁵⁸ Cal Rules of Court, rule 5.482(e)

official act of the tribe), and combine the Notice with a discovery request to obtain the court file.⁵⁹

e. HEIGHTENED BURDEN OF PROOF

- Applicable standards of evidence/proof:
 - ▶ Foster care = clear and convincing evidence, including testimony of a qualified expert witness.
 - ▶ Termination of Parental Rights = beyond a reasonable doubt, including testimony of a qualified expert witness.
- The existence of particular conditions in the home must be connected to the likelihood of serious emotional or physical damage to the child.
 - ▶ By itself the following do not constitute clear and convincing evidence: isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or non-conforming social behavior.

f. ACTIVE EFFORTS

i. Legal Background

- Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to, and until the commencement of, the proceeding, “active efforts [were] made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts [were] unsuccessful.”
- Clear and convincing evidence of the active efforts is required.⁶⁰
- “Active Efforts”
 - ▶ Term “active efforts” has had varying interpretations.⁶¹
 - ▶ Active efforts are more than the reasonable efforts required by Title IV-E
 - ▶ California
 - What constitutes active efforts shall be assessed on a case-by-case basis.
 - The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child’s tribe.
 - Active efforts shall utilize the available resources of the Indian child’s extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.⁶²

⁵⁹ Cal Rules of Court, rule 5.534(i)(1)

⁶⁰ In re Michael G. (1998) 63 Cal.App.4th 700, 714

⁶¹ See, 25 U.S.C. §§ 1903, 1912(d)

⁶² Welf. & Inst. Code § 361.7(b); See also, 25 U.S.C. §§ 1903, 1912(d), Cal. Rules of Court, Rule 5.484(c)(1)-(2)

- The BIA Guidelines characterize active efforts as: affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.
- ▶ To that end, the BIA Guidelines and Regulations provide a non-exclusive list of active efforts. Active efforts are to be tailored to the facts and circumstances of the case and pursuant to 23.2 that may include:
 - (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
 - (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
 - (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
 - (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
 - (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
 - (6) Taking steps to keep siblings together whenever possible;
 - (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
 - (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
 - (9) Monitoring progress and participation in services;
 - (10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
 - (11) Providing post-reunification services and monitoring.

➤ **Common Issues**

1) **Attend and Participate in Proceedings**

Incarcerated Parents

- Right to notice
- Right to be present

The court must allow the parent to physically attend for: jurisdictional ⁶³ or dispositional hearing⁶⁴, and any permanency planning hearing ⁶⁵ in which termination of parental rights is at issue.

The court may order the parent be permitted to physically attend any other hearing in a dependency proceeding, including but not limited to a detention hearing or a review hearing.

- Right to services

Unless one of the provisions applies to bypass or otherwise deny the parent reunification services, the parent must be provided reunification services. The mere fact that the parent is incarcerated is not a basis for the denial or failure to provide services.⁶⁶

~ Advocate Checkpoint ~

- Does the social worker report show that the social worker made active efforts to investigate what services and programs exist in the facility?
- Does the report show that the worker made active efforts to ensure that parent has access to those services?
- To the extent that the services are not already available at the facility, has the social worker developed alternative methods for delivering the services?

Children

- Any child that is subject to a juvenile court hearing is entitled to be present at the hearing. ⁶⁷
 - ▶ If the child is not present and is 10 years of age or older, the court must determine:
 - whether the child was properly notified of his or her right to attend the hearing
 - and
 - ask why the child is not present at the hearing and whether the child was given an opportunity to attend.
 - ▶ If the court finds that the child was not properly notified or that the child wished to be present and was not given an opportunity to be present, the court must continue the hearing to allow the child to attend.

⁶³ Welf. & Inst. Code § 355

⁶⁴ Welf. & Inst. Code § 358 or 361

⁶⁵ Welf. & Inst. Code § 366.26

⁶⁶ See, Welf. & Inst. Code § 290.1-294; Cal. Rules of Court, rule 5.530

⁶⁷ Cal. Rules of Court, rule 5.534(p), Welf. & Inst. Code §349

The court will not continue the hearing if the court finds that it is in the best interest of the child not to continue the hearing.

Any such continuance must be only for that period of time necessary to provide notice and secure the presence of the child.

- ▶ The court may issue any and all orders reasonably necessary to ensure that the child has an opportunity to attend. ⁶⁸

~ Advocate Checkpoint ~

- Are there transportation challenges?
 - Is distance a barrier?
 - Does the child have any special needs that are a barrier to attending?
- The court must allow the child, if the child so desires, to address the court and participate in the hearing. ⁶⁹

2) Development and Input Into Case Plan

- There must be an individual case plan ⁷⁰ for each child receiving foster care payments. ⁷¹
- The goals of the case plan are to
 - ensure that the child receives the protection and safe and proper care and case management;
 - provide services to improve conditions in the parent's home;
 - facilitate the child's safe return to a safe home or the child's permanent placement; and
 - address the child's needs while in foster care. ⁷²
- Every dependent child is entitled to participate in age-appropriate "extracurricular, enrichment, and social activities." ⁷³
- The case plan must describe the services to be provided concurrently to achieve legal permanence for the child if reunification efforts fail. ⁷⁴
- If the court finds the agency did not consult with the child's tribe, the court must order the agency to do so, unless the court finds that the tribe is unable, unavailable, or unwilling to participate. ⁷⁵
- Similarly the court must find whether the child and parents were actively involved in the development of the case plan. ⁷⁶ If the court finds a lack of involvement, it must order the agency to ensure such participation. ⁷⁷

⁶⁸ Cal. Rules of Court, rule 5.534(p), Welf. & Inst. Code §366.26(h)(2)

⁶⁹ Cal. Rules of Court, rule 5.534(p), Welf. & Inst. Code §349

⁷⁰ 42 U.S.C. §675(1)

⁷¹ See 42 U.S.C. §622(a)

⁷² Welf. & Inst. Code §16501.1(a)

⁷³ Welf. & Inst. Code §362.05

⁷⁴ Welf. & Inst. Code §16501.1(f)

⁷⁵ Cal Rules of Court 5.708(g)(3)

⁷⁶ Welf. & Inst. Code §16501.1(d)(1)

- The case plan must be updated as the service needs of the child and family dictate.⁷⁸ At minimum, the case plan must be updated with each status review, but no less than every six months.⁷⁹

~ Advocate Checklist ~

- Was there collaboration with the Tribe on the development of the case plan?
- Are the “active efforts” documented?
- Are there regular status updates to the Tribe?
- Was input from the Tribe requested at every juncture?

3) Visitation

- Visitation must be ordered between the parent or guardian and the child.
- Visitation must be ordered between the child and any siblings, unless the court finds by clear and convincing evidence that sibling interaction is contrary to the safety or well-being of either child.⁸⁰
- Where the child was removed, the court must consider whether the family ties and best interest of the child will be served by granting visitation rights to the child’s grandparents. The court shall clearly specify those rights to the social worker.⁸¹
- Visitation shall be as frequent as possible, consistent with the well-being of the child.⁸² No visitation order shall jeopardize the safety of the child.⁸³

~ Advocate Checkpoint ~

- Have all persons important to the child been identified?
- Has the social worker been informed of these persons?
- Has arrangements been made to facilitate the child’s contact with these persons?
- What barriers exist to these contacts?
- Are there alternative methods for facilitating the contact? (i.e., telephone, email, Skype?)
- Are there other additions needed in the Case Plan to effectuate active efforts? (funding for calls etc.?)
- Did tribe report these needs in its hearing report?
- Did the court make clear orders providing for these needs?
- The language of the order is very important.

⁷⁷ Cal. Rules of Court. 5.706(d)(2), 5.708(g))

⁷⁸ Welf. & Inst. Code § 16501.1(d)

⁷⁹ Welf. & Inst. Code §16501.1(d)

⁸⁰ Welf. & Inst. Code § 361.2(a)(2), 16002(b).

⁸¹ Welf. & Inst. Code § 361.2(i).

⁸² Welf. & Inst. Code §361.2(a)(1)(A)

⁸³ Welf. & Inst. Code §361.2(a)(1)(B)

~ Advocate Checklist ~

- ▶ Terms Clear and Unambiguous
- ▶ Frequency
- ▶ Location
- ▶ Supervised vs. Unsupervised

4) Placement Preferences

- The U.S. Supreme Court has characterized ICWA's placement preferences as "[t]he most important substantive requirement imposed on state courts."⁸⁴
- The ICWA sets forth two orders of preference for placement of Indian children – one for adoptive placements, and the other for foster care and preadoptive placements.⁸⁵ The placement preferences have also been incorporated into California law.⁸⁶
- Applies any time that an Indian child is removed from the physical custody of his or her parents or Indian custodian and cannot have the child returned upon demand.⁸⁷
- Applies not only to the initial placement of an Indian child after removal, but also when a child is removed from a foster care home or institution, guardianship, or adoptive placement for subsequent further placement.⁸⁸

i. Foster Care and Pre-adoptive Placement Preferences

- ▶ Least restrictive environment that most closely approximates their family is required.⁸⁹
- ▶ The law also requires the social services agency to place children as close as possible to their current home, and take into account any special needs.
- ▶ Preference must be given (in descending order) to the following:
 1. A member of the Indian child's extended family;
 2. A foster home licensed, approved, or specified by the Indian child's tribe;
 3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
 4. An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.⁹⁰

⁸⁴ *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36

⁸⁵ 25 U.S.C. § 1915(a), (b).

⁸⁶ Welf. & Inst. Code § 361.31(b), (c).

⁸⁷ Welf. & Inst. Code § 361.31; See also, 25 U.S.C. §§ 1903(1), 1915(a), (b);

⁸⁸ Welf. & Inst. Code § 224.2(b); See also, 25 U.S.C. § 1916

⁸⁹ 25 U.S.C. § 1915(b); Welf. & Inst. Code § 361.31(b).

⁹⁰ 25 U.S.C. § 1915(b); Welf. & Inst. Code § 361.31(b)

Dual intent: to minimize the disruption on a child's life and promote reunification.

ii. Adoptive Placement Preferences

- In descending order, preferences must be given as follows:⁹¹

1. A member of the child's "extended family."
2. Other members of the child's tribe.
3. Another Indian family. ⁹²

At this point reunification with the parents is not likely to be achieved, so the child's need for permanence takes paramount importance over the need for keeping children close to their current home and to their parents.

- "Extended Family" is governed by the ICWA, not state law.
 - ▶ The ICWA defines "extended family" by first deferring to the Indian child's tribe. ⁹³
 - ▶ If tribal law or custom does not provide a definition, the ICWA's default is "a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent."
- Courts must also apply the tribe's social and cultural standards when determining an Indian child's placement. ⁹⁴
- Anyone involved in the placement of an Indian child must use any available services of the Indian child's tribe in seeking to secure placement within the order of preference.⁹⁵
- Under the ICWA's full faith and credit provision, tribally-approved or -licensed homes are entitled to treatment similar to foster homes licensed by the state.
- The child's tribe may establish a different order of preference than the defaults specified in the ICWA. ⁹⁶

iii. Good cause to place outside of the mandated preferences

- The burden to establish good cause is on party seeking the departure.
- Good cause must be proved by "clear and convincing evidence."

▶ What is "good cause"?

A good cause finding may be based on:

(A) The requests of the parent or Indian custodian;

⁹¹ See, 25 U.S.C. § 1911(d); Welf & Inst. Code § 224.5

⁹² 25 U.S.C. § 1915(b)

⁹³ 25 U.S.C. § 1903(2)

⁹⁴ 25 U.S.C. § 1915(d); Welf. & Inst. Code §361.31(f)

⁹⁵ Welf. & Inst. Code § 361.31(g); Cal. Rules of Court, rule 5.482(g)

⁹⁶ 25 U.S.C. § 1915(c).

(B) The requests of the Indian child, when of sufficient age;

(C) The extraordinary physical or emotional needs of the Indian child *as established by a qualified expert witness*; or

(D) The unavailability of suitable families based on a documented diligent effort to identify families meeting the preference criteria.⁹⁷

▶ **“Good Cause” Is Not:**

- It is not sufficient to place with a non-preferred placement simply because the tribe has not located a placement.
 - The socio-economic status of any placement relative to another placement.
 - There is no independent consideration of best interest consideration; the preferences reflect the best interests of an Indian child in light of the purposes of the Act
 - No bonding exception
 - No “existing Indian family doctrine” in California ⁹⁸
- ▶ Where no preferred placement is available, “active efforts” must then be made (and documented) to ensure that the child’s placement is with a family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe.⁹⁹
- ▶ The agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences
- ▶ The record must document what efforts were made to comply with the ICWA’s placement preferences, and that record must be made available to the child’s tribe at any time. ¹⁰⁰

➤ Documented family finding efforts must be made:

Due Diligence to Find Family

In determining whether the social worker has exercised due diligence in conducting the required investigation to identify, locate, and notify the child's relatives, the court can consider whether the social worker:

- Asked the child, in an age-appropriate manner and consistent with the child's best interest, about his or her relatives;
- Obtained information regarding the location of the child's relatives;
- Reviewed the child's case file for any information regarding relatives;

⁹⁷ Welf. & Inst. Code §361.3, Cal. Rules of Court, Rule 5.484(b)(2);

⁹⁸ Welf & Inst. Code §224.2(a)(2)

⁹⁹ Welf. & Inst. Code § 361.31(i); see also, Cal. Rules of Court, Rule 5.484(b)(6)

¹⁰⁰ 25 U.S.C. § 1915(e); See, Welf. & Inst. Code §361.7(c)

- Telephoned, e-mailed, or visited all identified relatives;
- Asked located relatives for the names and locations of other relatives;
- Used Internet search tools to locate relatives identified as supports; or
- Developed tools, including a genogram, family tree, family map, or other diagram of family relationships, to help the child or parents to identify relatives.¹⁰¹

Family Finding Determination

The social worker report should include:

- The number of relatives identified and the relationship of each to the child;
 - The number and relationship of those relatives who were located and notified;
 - The number and relationship of those relatives who are interested in ongoing contact with the child; and
 - The number and relationship of those relatives who are interested in providing placement for the child.¹⁰²
- The appropriateness of any relative placement.¹⁰³
 - Whether the caregiver desires, and is willing, to provide legal permanency for the child if reunification is unsuccessful.¹⁰⁴
 - For an Indian child, in consultation with the Indian child's tribe, whether tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful.¹⁰⁵
- If an able and willing relative or an able and willing nonrelative extended family member is available and requests temporary placement of the child pending the detention hearing, county welfare department must initiate an assessment of the relative's or nonrelative extended family member's suitability.¹⁰⁶
 - The social worker shall, to the extent that it is practical and appropriate, place the minor together with any siblings or half-siblings who are also detained.

If the siblings cannot be placed together, the social worker report must include a statement regarding the social worker's continuing efforts to place the siblings together or why those efforts are not appropriate.¹⁰⁷

iv. Home Evaluation

¹⁰¹ Cal. Rules of Court, rule 5.695(f), (g)

¹⁰² Cal. Rules of Court, rule 5.637, 5.690(a)(1)(C)

¹⁰³ Welf. & Inst. Code § 358.1(h)

¹⁰⁴ Welf. & Inst. Code § 358.1(i)

¹⁰⁵ Welf. & Inst. Code § 358.1(j)

¹⁰⁶ Welf. & Inst. Code § 306.5(d)(1)

¹⁰⁷ Welf. & Inst. Code § 306.5

- Before placing a child in the home of a relative, or the home of any prospective guardian or other person who is not a licensed or certified foster parent, the county social worker shall visit the home to ascertain the appropriateness of the placement.¹⁰⁸
 - The following *must* be checked
 - A criminal records check shall be conducted with regard to all persons over 18 years of age living in the home, and on any other person over 18 years of age, other than professionals providing professional services to the child, known to the placing entity who may have significant contact with the child, including any person who has a familial or intimate relationship with any person living in the home.¹⁰⁹
 - The follow *may* be checked
 - A criminal records check may be conducted on any person over 14 years of age living in the home who the county social worker believes may have a criminal record.¹¹⁰
- Federally recognized Indian tribes are authorized to approve or license a home for foster care or adoptive purposes.¹¹¹ Rather than the home being required to obtain a state or county license, the tribe's approval or license can be according to its own socially and culturally appropriate standards.¹¹²
- These have historically always been done by the County. More recently, Title IV-E Tribes have been able to obtain access to summary criminal background information and CACI information through the California Department of Justice.
- Federally recognized Indian tribes are authorized to approve or license a home for foster care or adoptive purposes. Rather than the home being required to obtain a state or county license, the tribe's approval or license can be according to its own socially and culturally appropriate standards. See, 25 U.S.C. § 1931.
- New legislation allows Tribes to assess and where appropriate provide criminal background exemptions. These exemptions must be done in accordance with state exemption standards.
 - ▶ Where the potential placement would satisfy the ICWA's placement preferences, the county must request an exemption ("waiver"). The request is made through California Department of Social Services (CDSS).¹¹³
 - ▶ An Indian tribe may make its own request for a criminal record exemption for a potential placement, *either* from a county with the proper authority *or* from the state Department of Social Services directly.¹¹⁴

g. QUALIFIED EXPERT WITNESS

i. Legal Background

- To meet the heightened burden of proof for foster care placement or termination of parental rights, the petitioner must present the testimony of one or more "qualified experts," demonstrating that

¹⁰⁸ Welf. & Inst. Code §361.4(a)

¹⁰⁹ Welf. & Inst. Code §361.4(b)

¹¹⁰ Welf. & Inst. Code §361.4(b)

¹¹¹ 25 U.S.C. § 1915

¹¹² See, 25 U.S.C. § 1931.

¹¹³ See, Welf. & Inst. Code §361.4

¹¹⁴ Welf. & Inst. Code § 361.4(f)

continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.¹¹⁵

- ICWA itself does not establish precise qualifications for an expert witness.
- The BIA Guidelines do provide though that:
 - ▶ A qualified expert witness should have specific knowledge of the Indian tribe's culture and customs.
 - ▶ Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:
 1. Member of the child's tribe recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices
 2. Member of another tribe recognized by the child's tribe as a qualified expert witness
 3. Layperson recognized by the child's tribe...
 4. A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices in the child's tribe.
- The Welfare and Institutions Code also provide a list of persons that "most likely" meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:
 - "(1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
 - (2) Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
 - (3) A professional person having substantial education and experience in the area of his or her specialty.¹¹⁶
- A tribe may authorize another tribe to act as its representative in a child custody case, including performing expert witness services.
- The expert should not be an employee of the agency recommending foster care placement or termination of parental rights.¹¹⁷
- The expert witness should not be the advocate.

ii. Common Issues

¹¹⁵ 25 U.S.C. §1912(e)-(f); Welf. & Inst. Code § 224.6(c); Cal Rules of Court, rule 5.484(a)(1)

¹¹⁶ Welf. & Inst. Code § 224.6(c)

¹¹⁷ Welf. & Inst. Code § 224.6(6)

- Both state and federal law require the expert witness to testify on the question of whether “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”¹¹⁸
- In California, though, the court is also to consider evidence concerning the prevailing social and cultural standards of the Indian child’s tribe, including that tribe’s family organization and child-rearing practices.¹¹⁹
- Only one expert witness is required under federal rules of construction.
- The court may accept a declaration or affidavit from the expert witness in place of testimony.¹²⁰
 - ▶ But it is not permitted unless:
 - the parties stipulate to such in writing, and
 - the court determines that the stipulations were made knowingly, intelligently, and voluntarily.¹²¹

~ Advocate Checkpoint ~

- ▶ Ask:
 - What subject the witness is an “expert” in?
 - What qualifications the witness has that qualifies the witness as an “expert” on that subject?
 - What opinion/belief did they reach based on that expertise?
 - What information did they rely on to reach that opinion/belief?
 - Was the information complete and accurate?
 - Are there any issues or indication of bias?

h. PERMANENCY PLANNING

- In a non-ICWA case, there is a presumption that termination of parental rights is appropriate. If there is clear and convincing evidence that the child is likely to be adopted, the court must terminate parental rights and order the child placed for adoption (this is often referred to “standard” or “conventional adoption,” as compared to tribal customary adoption, or “TCA”).
- However, in an ICWA case, given the potential harm to an Indian child which may result from termination of parental rights, the advocate should be prepared to articulate the possibility of that harm, and to argue other permanency options to the court.

i. TRIBAL CUSTOMARY ADOPTION

- TCA is a unique permanency option in two ways.¹²²

¹¹⁸ 25 U.S.C. § 1912(e), (f); Welf. & Inst. Code §§ 224.6(b)(1), 361.7(c)

¹¹⁹ Welf. & Inst. Code §§ 224.6(b)(2)

¹²⁰ Welf. & Inst. Code § 224.6(e)

¹²¹ Welf. & Inst. Code § 224.6(e)

- ▶ First, although it is a state court adoption, it incorporates the customs, traditions, or laws of an Indian child's tribe, in that the tribe generates a Tribal Customary Adoption Order (TCAO). The state court issues its order after giving full faith and credit to the TCAO.
- ▶ Second, it does not require termination of parental rights, sparing the child any ill effects of that termination on their tribal membership rights or inheritance rights.
 - a. County agencies must consult with the tribe throughout the case about the appropriateness of TCA as the permanent plan.
 - b. Tribe may identify TCA as the permanent plan.
 - c. TCA is ordered at the §366.26 hearing.
 - d. §366.26 hearing is continued up to 120 days for Tribe to develop TCAO and for home study to be conducted.
 - e. TCAO is filed 20 days before the continued §366.26 date.
 - f. County agency files Addendum Report 7 days before continued 366.26 date.
 - g. Court orders full faith and credit of TCAO.
 - h. Adoption assistance agreement completed, TCA finalized, dependency jurisdiction dismissed.

See Welf. & Inst. Code § 366.24 generally for the nuts and bolts of TCA

ii. GUARDIANSHIP

- Another exception to the statutory preference for termination of parental rights is where the child is living with a relative who is unable or unwilling to adopt, but not because the relative is unwilling to accept legal or financial responsibility for the child, and the removal of the child from the relative would be detrimental to the child.
 - a. If guardianship is identified as the appropriate permanent plan, there must be an assessment to support the recommendation.¹²³
 - b. The assessment must be read and considered by the court prior to the appointment, and this shall be reflected in the minutes of the court.¹²⁴
 - c. The court will then order that letters of guardianship issue.¹²⁵
 - d. If the child has been placed with the relative for at least six months, the court must terminate its dependency jurisdiction, except if the relative objects or on a finding of exceptional circumstances.¹²⁶

¹²³ Welf. & Inst. Code §366.26(d)

¹²⁴ Welf. & Inst. Code §366.26(d)

¹²⁵ Welf. & Inst. Code § 366.26(b)(3).

¹²⁶ Welf. & Inst. Code § 366.3(a).

- e. If after the order for guardianship is made, a change of circumstances arises to indicate that TCA may be an appropriate plan for the child, the court may vacate its previous order dismissing dependency jurisdiction over the child and order that a hearing be held pursuant to Welfare and Institutions Code § 366.26 to determine whether adoption or continued legal guardianship is the most appropriate plan for the child.¹²⁷

iii. CONTINUED FOSTER CARE

- After receiving evidence at the Welfare and Institutions Code § 366.26 hearing, the court can order that the child remain in foster care, but with a permanent plan of return home, adoption, legal guardianship, or placement with a fit and willing relative, as appropriate.¹²⁸
- This is the lowest of the order of preference for the permanent plan.
- This occurs where:
 - the child is living with an approved relative who is willing and capable of providing a stable and permanent environment, but not willing to become a legal guardian as of the hearing date, the court shall order a permanent plan of placement with a fit and willing relative.¹²⁹
 - and
 - the removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the relative caretaker.¹³⁰
- The court is required to make factual findings to identify the barriers to achieving a more permanent plan higher on the order of preferences.¹³¹
- The focus remains on achieving a permanent plan for the child. The courts orders that the child remain in foster care, but with a permanent plan of return home, adoption, legal guardianship, or placement with a fit and willing relative, as appropriate. ¹³²
- The court will then order that the periodic review hearing be set pursuant to Welfare and Institutions Code §366.3. ¹³³
- The court will then order that the periodic review hearing be set pursuant to Welfare and Institutions Code §366.3. ¹³⁴

j. REQUESTS TO INVALIDATE

i. Legal Background

¹²⁷ Welf. & Inst. Code § 366.3(c); see, Welf. & Inst. Code § 366.3(b)(1) regarding revocation or termination of an ordered guardianship.

¹²⁸ Welf. & Inst. Code § 366.26(c)(4)(B)(ii).

¹²⁹ Welf. & Inst. Code §366.26(b)(6)

¹³⁰ Welf. & Inst. Code §366.26(c)(4)(B)(i)

¹³¹ Welf. & Inst. Code §366.26(c)(4)(A)

¹³² Welf. & Inst. Code §366.26(c)(4)(B)(ii)

¹³³ Welf. & Inst. Code §366.26(b)(6)

¹³⁴ Welf. & Inst. Code §366.26(b)(7)

- If *certain* provisions of the ICWA are violated the state court child custody proceeding may be “invalidated.”¹³⁵
- Violations for: ¹³⁶
 - 25 U.S.C. section 1911 (addressing jurisdictional issues, including transfer to tribal court, intervention, and full faith and credit to tribal acts and proceedings)
 - 25 U.S.C. section 1912 (addressing issues in involuntary custody proceedings, including notice, time extensions, appointment of counsel, examination of documents filed with the court, active remedial/rehabilitative efforts, and evidentiary requirements)
 - 25 U.S.C. section 1913 (addressing issues in voluntary custody proceedings, including consent, the court’s certification thereof, and withdrawal of consent).
- Also, make sure to make as *clear, documented, and timely* objection to particular ICWA violation and request for invalidation.

ii. Process and How to Request

- Invalidation may be sought by the Indian child, the child’s tribe, or a parent or Indian custodian from whose custody the child was removed. ¹³⁷
- ICWA provides that a party with standing to petition for invalidation may do so in “any court of competent jurisdiction.” ¹³⁸
 - ▶ That term is not defined by the Act.
 - ▶ California Rules of Court provides that the juvenile court is a court of competent jurisdiction with the authority to hear the request to invalidate the foster placement or termination of parental rights. ¹³⁹
- The ICWA does not specify or limit the method or form to bring the petition.
- ICWA does not give a deadline for a request to invalidate.¹⁴⁰ But it should not be delayed.

III. OTHER ADVOCATE ACTIONS & ACTIVITIES

a. REQUEST TO CHANGE VENUE

i. Legal Background

- The proper court in which to commence proceedings to declare a child a dependent or ward of the court is the juvenile court in the county:
 - In which the child resides;

¹³⁵ 25 U.S.C. § 1914; Fam. Code § 175(e); Prob. Code § 1459(e); Welf. & Inst. Code § 224(e); Cal. Rules of Court, rule 5.486

¹³⁶ 25 U.S.C. § 1914

¹³⁷ 25 U.S.C. § 1914

¹³⁸ 25 U.S.C. § 1914

¹³⁹ Cal. Rules of Court, rule 5.486(b)

¹⁴⁰ See, 25 U.S.C. §1914

- In which the child is found; or
 - In which the acts take place or the circumstances exist that are alleged to bring the child within the provisions of Welfare and Institutions Code §§ 300 or 601 or 602.¹⁴¹
- No transfer unless court determines the transfer will protect or further the child's best interest.¹⁴²

ii. Process and How to Request

- On receipt and filing of a certified copy of a transfer order, the receiving court must accept jurisdiction of the case. The receiving court may not reject the case.
- The clerk of the receiving court must immediately place the transferred case on the court calendar for a transfer-in hearing:
- Within 2 court days after the transfer-out order and documents are received if the child has been transported in custody and remains detained; or
 - Within 10 court days after the transfer-out order and documents are received if the child is not detained in custody. There can be no requests for additional time for the transfer-in hearing.
- The clerk must immediately notice the child and the parent or guardian, orally or in writing, of the time and place of the transfer-in hearing.
 - The hearing regarding the transfer-in of the case is then held.
 - The receiving court must notify the transferring court on receipt and filing of the certified copies of the transfer order and complete case file.¹⁴³

For information on the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) see, Family C. §§ 3421, 3400-3465.

b. APPLICATION TO COMMENCE PROCEEDINGS (WELF. & INST. CODE §329)

- Any person may make an application to the agency to commence juvenile court proceedings.¹⁴⁴
- The application must be in the form of an affidavit alleging facts showing the child is described in Welfare and Institutions Code § 300.¹⁴⁵
- The social worker must then proceed under Welfare and Institutions Code §329.¹⁴⁶
- This means that the agency has three weeks from the date of the application to file a petition.

¹⁴¹ Cal. Rules of Court, rule 5.510; Welf. & Inst. Code §327

¹⁴² Cal. Rules of Court, rule 5.610(e)

¹⁴³ See, Cal. Rules of Court, rule 5.612(a); Welf. & Inst. Code §§ 378, 753.

¹⁴⁴ Cal. Rules of Court, rule 5.520(a), (c); Welf. & Inst. Code § 329

¹⁴⁵ Cal. Rules of Court, rule 5.520(a), (c); Welf. & Inst. Code § 329

¹⁴⁶ Cal. Rules of Court, rule 5.520(a), (c); Welf. & Inst. Code § 329

- If after one month, it does not, the applicant can apply to the juvenile court to review the agency's action in failing or refusing to file a petition. ¹⁴⁷
- The juvenile court will review the agency's refusal or failure to file a petition by proceeding under Welfare and Institutions Code §331.
- The juvenile court will then either affirm the agency's decision not to file a petition or will order that juvenile proceedings be commenced. ¹⁴⁸

c. PETITION FOR "MODIFICATION" OR "CHANGE OF ORDER" (WELF. & INST. CODE § 388)

- A petition for modification hearing may be filed by:
 - The probation officer, the parent, the guardian, the child, the attorney for the child, or any other person having an interest in a child who is a ward if the requested modification is not for a more restrictive level of custody;
 - The social worker, regarding a child who is a dependent, if the requested modification is not for a more restrictive level of custody; or
 - The parent, the guardian, the child, the attorney for the child, or any other person having an interest in a child who is a dependent.¹⁴⁹
- Where if upon change of circumstances or new evidence the court is to:
 - change, modify, or set aside an order previously made;
 - or
 - terminate the jurisdiction of the court over the child. ¹⁵⁰
- If all parties stipulate to the requested modification, the court may order modification without a hearing.
- The petition may be denied "ex parte" (i.e., without a hearing)
- If there is no stipulation and the petition is sufficient on its face ("prima facie" showing), the court must either:
 - order that a hearing on the petition be held within 30 calendar days after the petition is filed;
 - or
 - order a hearing for the parties to argue whether an evidentiary hearing on the petition should be granted or denied.
- If after that hearing, the court grants an evidentiary hearing, it must still be held within 30 calendar days *after the petition is filed*. ¹⁵¹

¹⁴⁷ Welf. & Inst. Code § 331

¹⁴⁸ Welf. & Inst. Code § 331

¹⁴⁹ Cal. Rules of Court, rule 5.560(e)

¹⁵⁰ Cal. Rules of Court, rule 5.560(d); Welf. & Inst. Code §388

- Notice is required.¹⁵²
- Contents of petition
 - ▶ A petition for modification must be liberally construed in favor of its sufficiency.
 - ▶ The petition must be verified and, to the extent known to the petitioner, must contain the following:
 - (1) The name of the court to which the petition is addressed;
 - (2) The title and action number of the original proceeding;
 - (3) The name and age of the child;
 - (4) The address of the child, unless confidential under this section;
 - (5) The name and address of the parent or guardian of the child;
 - (6) The date and general nature of the order sought to be modified;
 - (7) A concise statement of any change of circumstance or new evidence that requires changing the order or, for requests under Welfare and Institutions Code §388(c)(1)(B), a concise statement of the relevant action or inaction of the parent or guardian;
 - (8) A concise statement of the proposed change of the order;
 - (9) A statement of the petitioner's relationship or interest in the child, if the petition is made by a person other than the child; and
 - (10) A statement whether or not all parties agree to the proposed change.¹⁵³

d. RESTRAINING ORDER

- Once a dependency petition has been and until it is dismissed or dependency is terminated, the juvenile court has the power to issue restraining orders to protect the child.¹⁵⁴
- Purpose for the restraining order

To prevent the restrained person from:

- molesting,
- attacking,
- striking,
- stalking,
- threatening,
- sexually assaulting,

¹⁵¹ Cal. Rules of Court, rule 5.570(f)

¹⁵² See, Cal. Rules of Court, rule 5.570(g); Welf. & Inst. Code §§ 224.2, 290.2(e), 291(g)

¹⁵³ Cal. Rules of Court, rule 5.570(a)(1)-(10); Welf. & Inst. Code §§ 388, 778

¹⁵⁴ See, Cal. Rules of Court, rule 5.620(b), 5.630(a); Welf. & Inst. Code §213.5(a)

- battering,
- harassing,
- telephoning
- destroying the personal property,
- contacting, either directly or indirectly, by mail or otherwise,
- coming within a specified distance of, or
- disturbing the peace of the child or any other child in the household.¹⁵⁵

➤ Order can exclude a person from a residence or dwelling

This order may be issued for the time and on the conditions that the court determines, regardless of which party holds legal or equitable title or is the lessee of the residence or dwelling.

However, such an order can be made only on a showing of all of the following:

- (A) Facts sufficient for the court to ascertain that the party who will stay in the dwelling has a right under color of law to possession of the premises.
- (B) That the party to be excluded has assaulted or threatens to assault the other party or any other person under the care, custody, and control of the other party, or any minor child of the parties or of the other party.

and

- (C) That physical or emotional harm would otherwise result to the other party, to any person under the care, custody, and control of the other party, or to any minor child of the parties or of the other party.¹⁵⁶

➤ How to apply for a restraining order?

- The application may be made orally or by written application, or even may be made on the court's own motion.¹⁵⁷
- Can be made at any scheduled hearing.¹⁵⁸
- If the application is submitted in writing, there are forms that must be used. ¹⁵⁹
- Different forms for restraining orders involving domestic violence.¹⁶⁰

▶ Application Without Notice

The court may grant the petition and issue a temporary order even where no notice was given to the restrained person.

If the court grants the temporary restraining order, the court must order that the matter be set for a hearing to show cause why the order should not be granted. ¹⁶¹

¹⁵⁵ Welf. & Inst. Code §213.5

¹⁵⁶ Welf. & Inst. Code §213.5(e)

¹⁵⁷ Cal. Rules of Court, rule 5.620(b)(1)

¹⁵⁸ Cal. Rules of Court, rule 5.620(b)(1)

¹⁵⁹ Cal. Rules of Court, rule 5.620(b)(1)

¹⁶⁰ See, Welf. & Inst. Code §215.5(i); See, Fam. C. §600 et. seq., 6380(i)

¹⁶¹ See, Welf. & Inst. Code §213.5(c)(1)

► Application With Notice

Upon notice and hearing, the court can issue a restraining order that is to remain in effect for up to three years. The duration of the restraining order is in the court's discretion. ¹⁶²

The order will remain in effect unless it is otherwise terminated by the court, extended by mutual consent of all parties to the restraining order, or extended by further order of the court on the motion of any party to the restraining order. ¹⁶³

If the juvenile case is dismissed, the restraining order remains in effect until it expires or is terminated.¹⁶⁴

➤ Hearing on application for restraining order

The court will consider the proof on the application and any attachments additional declarations or documentary evidence, the contents of the juvenile court file, testimony, or any combination of these.¹⁶⁵

➤ Before any hearing on the issuance of a restraining order the court must ensure that a criminal records search is or has been conducted.

➤ Service is required of the issued order. ¹⁶⁶

➤ Issued order must be transmitted to law enforcement ¹⁶⁷

e. ADVOCATING FOR THE WELLBEING OF THE CHILD

➤ The purpose of both dependency and delinquency law is to protect a child's best interest, including "to preserve and strengthen the child's family ties whenever possible." ¹⁶⁸

➤ That entails not just the child's placement if removed from his or her home, but also the child's educational needs and rights, medical care, and mental health.

➤ Any interested person may inform the court of a child's interest or right which needs protection or pursuit in another judicial or administrative forum. ¹⁶⁹

➤ So it appears that the court is unaware of a child's needs outside of the immediate proceedings, it is best to speak up.

i. Placement

To the fullest extent possible, a home that best meets the day-to-day needs of the child must satisfy all of the following criteria:

¹⁶² See, Welf. & Inst. Code §213.5(d)(1)

¹⁶³ See, Welf. & Inst. Code §213.5(d)(1)

¹⁶⁴ Cal. Rules of Court, rule 5.630(i)

¹⁶⁵ Cal. Rules of Court, rule 5.630(f)

¹⁶⁶ Cal. Rules of Court, rule 5.630(g)

¹⁶⁷ Welf. & Inst. Code §213.5(g)

¹⁶⁸ Welf. & Inst. Code § 202(a)

¹⁶⁹ Cal. Rules of Court, rule 5.660

- The child’s caregiver is able to meet the day-to-day health, safety, and well-being needs of the child.
- The child’s caregiver is permitted to maintain the least restrictive family setting that promotes normal childhood experiences.
- The child is permitted to engage in reasonable, age-appropriate day-to-day activities that promote normal childhood experiences for the child.¹⁷⁰

ii. Assigning Educational and Developmental-Services Decision-Making Rights

- ▶ Children in the system are disproportionately represented as to disabilities, and “face systemic challenges to attaining self-sufficiency.
- ▶ Children in the juvenile system frequently have long-neglected educational needs, and parents in the system may have been long unaware of those needs or unable to meet them.
- ▶ A child in foster care or at risk of entering foster care has a right to a “meaningful opportunity” to meet the state’s academic achievement standards, through a stable school placement in the least restrictive environment possible, with access to the same “academic resources, services, and extracurricular and enrichment activities that are available to other pupils.”¹⁷¹
- ▶ *At the detention hearing* the court must decide who shall hold educational and developmental-services decision-making rights, and identify the rights holder(s).¹⁷²
- ▶ *At the dispositional hearing and at all subsequent hearings*, the court must consider whether the child’s educational needs (in addition to physical, mental health, and developmental needs) are being met. The educational rights holder must be identified. The court must direct that person to take all appropriate steps to ensure that the child’s needs will be met in the future.¹⁷³

iii. Informing the court of the youth’s interest

At any time after the petition is filed and until the court’s jurisdiction is terminated, any interested person may advise the court of information regarding an interest or right of the child to be protected or pursued in other judicial or administrative forums.

- If the court determines that further action on behalf of the child is required to protect or pursue any interests or rights, the court must appoint an attorney for the child, if the child is not already represented by counsel, and do one or all of the following:
 - Refer the matter to the appropriate agency for further investigation and require a report to the court within a reasonable time;
 - Authorize and direct the youth’s attorney to initiate and pursue appropriate action;

¹⁷⁰ See, Welf. & Inst. Code § 361.2(k)

¹⁷¹ Cal. Rules of Court, rule 5.651 - Advisory Committee Comment

¹⁷² Cal. Rules of Court, rule 5.651(b)(1).

¹⁷³ Cal. Rules of Court, rule 5.651(b)(2)

- Appoint a guardian ad litem for the child. The guardian may be the CASA volunteer already appointed as a CAPTA guardian ad litem or a person who will act only if required to initiate appropriate action; or
- Take any other action to protect or pursue the interests and rights of the child.¹⁷⁴

iv. Medical Care and Treatment

Whenever a child is taken into temporary custody and is in need of medical, surgical, dental, or other remedial care, the social worker may, upon the recommendation of the attending physician and surgeon, or an attending dentist, authorize the performance of necessary care.

v. Mental Health

Whenever the court believes that the child is or may be mentally ill, the court may stay the proceedings and order that the child be held temporarily in the psychiatric ward of the county hospital or hospital whose services have been approved and/or contracted for by the county, for observation and recommendation concerning their future care, supervision, and treatment.

The professional in charge of the facility must submit a written evaluation of the child to the court.¹⁷⁵

For a finding of mental disorder see Welf. & Inst. Code § 5250, 5260.10 et seq., 5350 et seq.

For a finding of substance abuse see Welf. & Inst. Code §359

vi. Psychotropic Medication

- ▶ "Psychotropic medications" = medications prescribed to affect the central nervous system to treat psychiatric disorders or illnesses. They may include, but are not limited to, anxiolytic agents, antidepressants, mood stabilizers, antipsychotic medications, anti-Parkinson agents, hypnotics, medications for dementia, and psychostimulants.¹⁷⁶
- ▶ Once a child is declared a dependent or ward and is removed from the custody of the parents or guardian, only the court is authorized to make orders regarding the administration of psychotropic medication.¹⁷⁷
- ▶ The court may still make an order delegating its authority to the parent or guardian if it finds that the parent or guardian poses no danger to the child and has the capacity to authorize psychotropic medications. Such order is discretionary and must take into consideration the child's best interests.¹⁷⁸
- ▶ Notice must be given to the parties, including the child's tribe.¹⁷⁹
- ▶ The notice will include:

¹⁷⁴ Cal. Rules of Court, rule 5.660

¹⁷⁵ Cal. Rules of Court, rule 5.645(a); Welf. & Inst. Code §§ 319.1, 3571, 705, 6550, 6551

¹⁷⁶ Cal. Rules of Court, rule 5.640(a); Welf. & Inst. Code § 369.5(d)

¹⁷⁷ Cal. Rules of Court, rule 5.640(b); See, Welf. & Inst. Code § 369.5(a)

¹⁷⁸ Welf. & Inst. Code §§ 202(d), 369.5(a)

¹⁷⁹ Cal. Rules of Court, rule 5.640(c)(7)

- A statement that a physician is asking to treat the child’s emotional or behavioral problems by beginning or continuing the administration of psychotropic medication to the child and the name of the psychotropic medication;
 - A statement that an Application Regarding Psychotropic Medication (form JV-220) and a Prescribing Physician's Statement-Attachment (form JV-220(A)) are pending before the court;
 - A copy of Information About Psychotropic Medication Forms (form JV-219-INFO) or information on how to obtain a copy of the form; and
 - A blank copy of Opposition to Application Regarding Psychotropic Medication (form JV-222) or information on how to obtain a copy of the form.
- ▶ An Opposition to the medication application can be filed. The Opposition to Application Regarding Psychotropic Medication (form JV-222) is required within four court days of service of notice of the pending application for psychotropic medication.
 - ▶ The court may grant the application without a hearing (despite the Opposition) or may set the matter for hearing.
 - ▶ The order for authorization is effective until terminated or modified by court order or until 180 days from the order, whichever is earlier.
 - ▶ Psychotropic medications may be administered without court authorization in an emergency situation.

vii. Joinder of Agencies

- ▶ “Joinder” = The court may join in the proceedings any agency that the court determines has failed to meet a legal obligation to provide services to a child or a nonminor or nonminor dependent youth.¹⁸⁰
- ▶ The court may not impose duties on an agency beyond those required by law.¹⁸¹

For more information see Cal. Rules of Court, rule 5.575(b); See Welf and Inst. Code § 362, 365.

viii. Youth Transferring Between Dependency and Delinquency Systems

- ▶ When a child already described by Welfare and Institutions Code § 300 (dependency) commits an act which falls under Welfare and Institutions Code §§ 601 or 602 (delinquency), an assessment must to done to determine the status that will better achieve child’s best interest and the protection of society.¹⁸²
- ▶ The assessment must be done jointly by the social services agency and probation department.¹⁸³
- ▶ Welfare and Institutions Code § 241.1(b) requires each county to develop a written protocol on the joint assessment.

¹⁸⁰ Cal. Rules of Court, rule 5.575(a)

¹⁸¹ Cal. Rules of Court, rule 5.575(a))

¹⁸² Welf. & Inst. Code § 241.1; Cal. Rules of Court, rule 5.512

¹⁸³ See, Cal. Rules of Court, rule 5.512(d).

- ▶ Courts often do not provide notice or participation to the Indian child

f. MAKING ARGUMENT AND OBJECTIONS

➤ Opening Argument

- Do not argue the law or facts
- Put the anticipated evidence into perspective
- Introduce and tell the story
 - Catchline/Grabber
 - “Father is not perfect, who is? But he when he made mistake, he did what we can only ask for a parent to do in the best interest of the child, which is to step up and do what the parent needs to do to protect the child.”
- List the issue the judge will have to decide
 - “You will be asked to decide whether the child’s placement with father would be detrimental to the safety, protection, or physical or emotional well-being of the child.”
- The Story
 - **“You will hear evidence that** Father In the 8 months since, father has maintained daily unsupervised visitation, is appropriate with the child, and is in full compliance with the strict requirements of his probation. This includes random and frequent drug testing. He and mom are no longer together.”

➤ Closing Argument

- I.R.A.C.

➤ Making Objections

- Common Objections
- Relevance
- Leading Questions
- Form of the Question
- Privilege
- Hearsay
- Lack of Personal Knowledge
- Lacks foundation
- Improper Expert Opinion
- Settlement Discussions
- Argumentative
- Assumes Facts Not In Evidence

VI. STAGES OF DEPENDENCY- WHAT TO LOOK FOR

a. Pre-Detention Investigation and Prevention

i. Referrals for Child Abuse or Neglect

- The identity of the person that made the referral is kept confidential.¹⁸⁴ The person can also make the referral anonymously.¹⁸⁵
- So long as the referral was not made falsely or with reckless disregard of its truth or falsity, the reporting party should not be subject to any civil or criminal liability for having made the report. (See, Pen. C. §11172(a))
- Any substantiated referrals will be reported to the Department of Justice.¹⁸⁶
- A warrant is not needed to take the child into temporary custody where:

- When the officer has reasonable cause for believing that the minor is at risk of abuse or neglect (as described in Welfare and Institutions Code § 300),

and,

that the minor has an immediate need for medical care, or the minor is in immediate danger of physical or sexual abuse, or the physical environment or the fact that the child is left unattended poses an immediate threat to the child's health or safety.¹⁸⁷

The officer must first attempt to contact the child's parent or guardian to see if the person is able to assume custody of the child.¹⁸⁸

If the parent or guardian cannot be contacted, the peace officer shall notify a social worker in the county welfare department to assume custody of the child.¹⁸⁹

- The parent is in the hospital and release of the minor to a parent poses an immediate danger to the child's health or safety.¹⁹⁰
- Where the child is already before the juvenile dependency court juvenile court and the officer has reasonable cause for believing that the minor has violated an order of the juvenile court or has left any placement ordered by the juvenile court.¹⁹¹
- Where the child is found in any street or public place suffering from any sickness or injury which requires care, medical treatment, hospitalization, or other remedial care.¹⁹²

¹⁸⁴ See, Pen. C. §11167(d)

¹⁸⁵ See, Pen. C. §11167(f)

¹⁸⁶ See, Pen. C. §11169(a)

¹⁸⁷ See, Welf. & Inst. Code §305(a)

¹⁸⁸ See, Welf. & Inst. Code §305(a)

¹⁸⁹ See, Welf. & Inst. Code §305(a)

¹⁹⁰ See, Welf. & Inst. Code §§305(b), 305.6

¹⁹¹ See, Welf. & Inst. Code §305(c)

¹⁹² See, Welf. & Inst. Code §305(d)

- Remember, ICWA allows for the emergency removal where the removal is needed in order to prevent imminent physical damage or harm to the child, but only as long as is necessary.¹⁹³
- The officer must either: release the minor¹⁹⁴ or deliver the child to the social worker.
- The social worker must then immediately investigate.
- The law presumes the social worker will release the child to the parents unless certain conditions exist as outlined in Welfare and Institutions Code § 309(a)

ii. Active Efforts To Prevent Detention

- In order to prevent removal, the “active efforts” requirement begins from the moment the *possibility* arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian.

Active efforts must be conducted even while it is still being investigated whether the child is an Indian child under the ICWA.

- Before the child is into custody, a social worker must consider whether the child can remain safely in his or her residence.

~ Advocate Checkpoint ~

- Are there any services that can be given to either parent or to the child to eliminate the need to remove the minor from the custody of his or her parent, guardian, or caretaker?
- Are there programs or services that the parent(s) can be referred to that would eliminate the need to take temporary custody of the minor? Has the parent(s) already been referred to such assistance?
- Can the offending person leave the child’s home? If so, are there any other orders that need to be made to ensure the child’s safety – i.e., a restraining order?
- Is the parent willing to accept services and participate in corrective efforts?

Alternatives to detention must be addressed, as specified in Welf. & Inst. Code §§ 305-307.

- If an alternative to detention is available, the law requires the social service agency to consider less restrictive alternatives. The county welfare department must provide or arrange for the family maintenance services to maintain the child in his or her own home.¹⁹⁵
- In lieu of a petition the social worker could undertake a program of supervision of the child.¹⁹⁶
 - ▶ In determining whether to undertake a program of informal supervision the social worker must consider:

¹⁹³ 25 U.S.C. §1922

¹⁹⁴ See, Welf. & Inst. Code §307(a), (b)

¹⁹⁵ See, Welf. & Inst. Code § 16506(a); See, Welf. & Inst. Code § 328

¹⁹⁶ Welf. & Inst. Code § 301(a)

- If the condition or conduct is not considered serious, whether the child has had a problem in the home, school, or community that indicates that some supervision would be desirable;
 - Whether the child and the parent or guardian seem able to resolve the matter with the assistance of the social worker or probation officer and without formal court action;
 - Whether further observation or evaluation by the social worker or probation officer is needed before a decision can be reached;
 - The attitudes of the child and the parent or guardian;
 - The age, maturity, and capabilities of the child;
 - The dependency or delinquency history, if any, of the child;
 - The recommendation, if any, of the referring party or agency;
 - The attitudes of affected persons; and
 - Any other circumstances that indicate that a program of informal supervision would be consistent with the welfare of the child and the protection of the public.¹⁹⁷
- ▶ Can occur only if child's parent or guardian consents to the informal supervision. ¹⁹⁸
 - ▶ If the parent or guardian complies but the objectives have not all been met, the social worker may extend the period up to an additional six months, with the consent of the parent or guardian.
 - ▶ If the parent or guardian refused to cooperate with the services being provided, the social worker may file a petition with the juvenile court.
- Whether to file the petition is in the discretion of the social worker. ¹⁹⁹

In determining whether to file a petition, the social worker must consider all of the following:

- (1) Whether any of the statutory criteria listed in California Rules of Court, rules 5.770 and 5.772 relating to the fitness of the child are present;
- (2) Whether the alleged conduct would be a felony;
- (3) Whether the alleged conduct involved physical harm or the threat of physical harm to person or property;
- (4) If the alleged condition or conduct is not serious, whether the child has had serious problems in the home, school, or community that indicate that formal court action is desirable;

¹⁹⁷ Cal. Rules of Court 5.516(b)

¹⁹⁸ Welf. & Inst. Code § 301; Cal. Rules of Court 5.514(e)(1)

¹⁹⁹ Cal. Rules of Court, rule 5.520(a)-(b); Welf. & Inst. Code § 325

- (5) If the alleged condition or conduct is not serious, whether the child is already a ward or dependent of the court;
- (6) Whether the alleged condition or conduct involves a threat to the physical or emotional health of the child;
- (7) Whether a chronic, serious family problem exists after other efforts to resolve the problem have been made;
- (8) Whether the alleged condition or conduct is in dispute and, if proven, whether court-ordered disposition appears desirable;
- (9) The attitudes of the child and the parent or guardian;
- (10) The age, maturity, and capabilities of the child;
- (11) Whether the child is on probation or parole;
- (12) The recommendation, if any, of the referring party or agency;
- (13) The attitudes of affected persons;
- (14) Whether any other referrals or petitions are pending; and
- (15) Any other circumstances that indicate that the filing of a petition is necessary to promote the welfare of the child or to protect the public.²⁰⁰

- If a petition is not filed, a written report is required if the child was held in custody for more than 6 hours.²⁰¹
- The initial hearing must be scheduled for no later than the next court (for a detained child) ²⁰²or within 15 *court* days (for a non-detained child). ²⁰³

b. Voluntary Consent To Foster Care Placement

- Voluntary consent to a foster care placement or to termination of parental rights is required to be:
 - executed in writing
 - and
 - recorded before a judge of a court of competent jurisdiction
 - and
 - accompanied by the presiding judge's certificate that
 - the terms and consequences of the consent were fully explained in detail
 - and

²⁰⁰ Cal. Rules of Court, rule 5.516(c)

²⁰¹ Welf. & Inst. Code §313(a); Cal. Rules of Court, rule 5.670(b)

²⁰² Cal Rules of Ct 5.670(d); See, Welf. & Inst. Code §315

²⁰³ Cal Rules of Ct 5.670(a)

- were fully understood by the parent or Indian custodian.
 - The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood.²⁰⁴
- Consent is not valid if it does not meet each of the requirements set forth above.
- A key example is the parent's right to withdraw consent and petition the court to vacate a final decree of adoption on the grounds that the consent was obtained through fraud or duress.
- or
- The consent given prior to, or within ten days after, birth of the Indian child shall not be valid.²⁰⁵
- Consent can be withdrawn at any time.²⁰⁶ Upon withdrawal, the child shall be returned to the parent or Indian custodian.²⁰⁷

c. The Petition & Initiation of Juvenile Dependency

i. Understanding the Elements of the Petition

- (1) The subdivision of Welfare and Institutions Code section 300 that the child is allegedly described under.

JV-120	Serious Physical Harm (§ 300 (a))
JV-121	Failure to Protect (§ 300 (b))
JV-122	Serious Emotional Damage (§ 300 (c))
JV-123	Sexual Abuse (§ 300 (d))
JV-124	Severe Physical Abuse (§ 300 (e))
JV-125	Caused Another Child's Death Through Abuse or Neglect (§ 300 (f))
JV-126	No Provision for Support (§ 300 (g))
JV-127	Freed for Adoption (§ 300 (h))
JV-128	Cruelty (§ 300 (i))
JV-129	Abuse of Sibling (§ 300 (i))

- (2) The legal standard for that subdivision.

- **§300(a) = a child who suffered or is at risk to suffer serious *physical harm* inflicted by the parent or guardian.**

Physical harm must be:

- inflicted non-accidentally upon the child
- and

²⁰⁴ 25 U.S.C. § 1913(a)

²⁰⁵ 25 U.S.C. § 1913(a)

²⁰⁶ 25 U.S.C. § 1913(b)

²⁰⁷ 25 USC § 1913(b)

- by the child's parent or guardian

For purposes of this subdivision, "serious physical harm" does not include reasonable and age-appropriate spanking to the buttocks if there is no evidence of serious physical injury.

A court may find there is a substantial risk of serious future injury based on:

- the manner in which a less serious injury was inflicted,
- a history of repeated inflictions of injuries on the child or the child's siblings, or
- a combination of these and other actions by the parent or guardian that indicate the child is at risk of serious physical harm.²⁰⁸

▪ **§300(b) = a child who suffered or is at risk to suffer serious *physical harm or illness* due to one of the following:**

- as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child,
- or
- the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left,
- or
- by the willful or neglectful failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment,

A child shall not be found to be a person described by this subdivision solely due to the lack of an emergency shelter for the family.

or

- by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse.

The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.²⁰⁹

▪ **§300(c) where a child is suffering, or at risk to suffering serious *emotional damage*.**

The emotional damage must be

- "serious"
- and
- evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others

²⁰⁸ See, Welf. & Inst. Code §300(a)

²⁰⁹ See, Welf. & Inst. Code §300(b)(1)

and

- the result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care.

A child shall not be found to be a person described by this subdivision if the willful failure of the parent or guardian to provide adequate mental health treatment is based on a sincerely held religious belief and if a less intrusive judicial intervention is available.²¹⁰

▪ **§300(d) where a child has been or is at substantial risk of being *sexually abused*.**

Applies where the sexual abuse is:

- By his or her parent or guardian or a member of his or her household,
- or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.
- “Sexual abuse” = sexual assault *or* sexual exploitation as broadly defined in that section.

▪ **§300(e) = a child who is under the age of five years and has suffered *severe physical abuse***

Could be done by a parent or by any person known by the parent, if the parent knew or should have known that the person was physically abusing the child

“Severe physical abuse” = any of the following:

- any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death;
- or
- any single act of sexual abuse which causes significant bleeding, deep bruising, or significant external or internal swelling;
- or
- more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, unconsciousness;
- or
- the willful, prolonged failure provide adequate food.²¹¹

▪ **§300(f) = where parent or guardian *caused the death* of another child through abuse or neglect.**

▪ **§300(g) = a child who has no provision for support, or abandoned**

²¹⁰ See, Welf. & Inst. Code §300(c)

²¹¹ Welf. & Inst. Code §300(e)

One of the following conditions must apply:

- the child has been left without any provision for support;
or
- physical custody of the child has been voluntarily surrendered pursuant to Health and Safety Code §1255.7 of the and the child has not been reclaimed within the 14-day period specified Health and Safety Code §1255.7(g);
or
- the child's parent has been incarcerated or institutionalized and cannot arrange for the care of the child;
or
- a relative or other adult custodian with whom the child resides or has been left is unwilling or unable to provide care or support for the child, the whereabouts of the parent are unknown, and reasonable efforts to locate the parent have been unsuccessful.²¹²

- **§300(h) = where 12 months have passed since the child has been freed for adoption or an adoption petition has not been granted**

This section applies where the child was freed for adoption by either relinquishment or termination of parental rights.

Or an adoption petition has not been granted.²¹³

- **§300(i) = a child subject to *acts of cruelty*.**

Could be done by the parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from an act or acts of cruelty when the parent or guardian knew or reasonably should have known that the child was in danger of being subjected to an act or acts of cruelty.²¹⁴

- **§300(j) where there has been *sibling abuse or neglect* as defined in §300(a), (b), (d), (e), or (i)**

The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.²¹⁵

- (3) The narrative of the particular alleged facts that will be used to support the agency's claim that the child is described under that section of Welfare and Institutions Code § 300.

➤ **“Subsequent Petition” (Welf. & Inst. Code §342)**

²¹² Welf. & Inst. Code §300(g)

²¹³ Welf. & Inst. Code §300(h)

²¹⁴ Welf. & Inst. Code §300(i)

²¹⁵ Welf. & Inst. Code §300(j)

The Department shall file a subsequent petition, where it learns that of new facts or circumstances of abuse or neglect that were not already in the original sustained petition.²¹⁶

Important- The new allegations must be different than those under which the original petition was sustained and constitute additional grounds for jurisdiction.²¹⁷

➤ **“Supplemental Petition” (Welf. & Inst. Code §387)**

Unlike the §342 Subsequent Petition (to assert a new or different basis for jurisdiction), a “Supplemental Petition” pursuant to Welfare and Institutions Code §387 is brought under the original basis for jurisdiction.

The Supplemental Petition §387 is for either:

- a previous disposition is inappropriate or ineffective in rehabilitating or protecting the child,
- or
- the that placement is inappropriate.²¹⁸

The §387 thereby requests that the child be put in a more restrictive placement.

d. Initial (“Detention”) Hearing

- The court will advise the parties of the contents of the petition; their rights and the nature of, and possible consequences of, juvenile court proceedings.²¹⁹
- If the child has been taken into protective custody, social worker must also report to the court:
 - The reasons why the child has been removed from the parent’s physical custody,
 - The need, if any, for continued detention,
 - The available services and the referral methods to those services that could facilitate the return of the child to the custody of the child’s parents or guardians,
 - and
 - Whether there are any relatives who are able and willing to take temporary physical custody of the child.²²⁰
- Counsel is appointed
- Establish parentage

²¹⁶ See, Cal. Rules of Court, rule 5.560(b)(1); Welf. & Inst. Code §342

²¹⁷ See, Cal. Rules of Court, rule 5.560(b)

²¹⁸ Cal. Rules of Court, rule 5.560(c)

²¹⁹ Cal. Rules of Court, rule 5.668(a); See Welf. & Inst. Code §§ 316, 316.2.

²²⁰ Welf. & Inst. Code §319(b)

- Inquiry and determination is made as to whether the child is or may be an Indian child.²²¹
- The court must read, consider, and reference any reports submitted by the social worker and any relevant evidence submitted by any party or counsel.²²² The parties have a right to cross-examine.
- The child, parent, or guardian has an absolute right to continuance of *one court day* to give time to prepare for the hearing.²²³

If a continuance is granted for any reason, the court must make a finding that either

- The continuance of the child in the parent's or guardian's home is contrary to the child's welfare, or
- Order the child released to the custody of the parent or guardian.²²⁴

This finding is entered on a temporary basis, without prejudice to any party, which can be reevaluated at the time of the continued detention hearing.²²⁵

- Ultimately, the court must determine whether there is a “prima facie” showing (a showing on the face of the petition) that the child may be described under by one or more of the provisions of Welfare and Institutions Code § 300(a)-(j).
- If there is enough evidence to show that the child *may* be so described, then the court will set the matter for a jurisdiction hearing where the court will decide if the child *is* described under one of those subsections warranting the court’s supervision of the child
- Separately, the court must determine whether there is a basis to detain the child pending the jurisdiction hearing.
 - ▶ The child will be detained if there is a prima facie showing that the child is described by Welfare and Institutions Code § 300, that continuance in the home of the parent or guardian is contrary to the child's welfare, and that one or more of the grounds for detention exists.²²⁶ If not, the child must be returned.
 - ▶ Efforts must be shown to prevent or eliminate the need for removal.
 - ▶ If the court orders the child detained, the court must:
 - Determine if there are services that would permit the child to return home pending the next hearing and state the factual bases for the decision to detain the child;
 - Specify why the initial removal was necessary
 - If appropriate, order services to be provided as soon as possible to reunify the child and the child's family; and

²²¹ Cal. Rules of Court, rule 5.534(i); 25 U.S.C. §§ 1911, 1931-1934

²²² Cal. Rules of Court, rule 5.674(b); Welf. & Inst. Code § 319.

²²³ Welf. & Inst. Code §322

²²⁴ Welf. & Inst. Code §319(c)

²²⁵ Welf. & Inst. Code §319, 322; Cal. Rules of Court, rules 5.550(c), 5.672

²²⁶ Cal. Rules of Court, rule 5.676(a); Welf. & Inst. Code § 319.

- Determine if there is a relative who is able and willing to care for the child, and has been assessed.²²⁷
- If child is not detained, the jurisdiction hearing must be held within 30 days of the date the petition is filed. If child is detained, the jurisdiction hearing must be set within 15 court days of the order of detention.²²⁸

e. Jurisdiction Hearing

- At this hearing, the court must find whether sufficient evidence exists that the child is described by one or more of the provisions of Welfare and Institutions Code § 300(a)-(j).
- The petition must be read to those present. If requested by the child or the parent, guardian, or adult relative, the court must explain the meaning and contents of the petition and the nature of the hearing, its procedures, and the possible consequences.²²⁹
- Any legally admissible evidence that is relevant to the circumstances or acts that are alleged to bring the child within the jurisdiction of the juvenile court and may be received in evidence.²³⁰
- Agency Social Study Report
 - ▶ The social worker's report is admissible and is sufficient to support a finding that the child is described by Welfare and Institutions § 300 even though it contains "hearsay".
 - ▶ However, the report must have been provided to all parties and their counsel within a reasonable time before the hearing.
 - ▶ The preparer of the report must also be made available for cross-examination on the request of any party.
 - ▶ The social worker who prepared the report does not have to be at the hearing, and can be on standby, as long as the preparer can be present in court within a reasonable time.²³¹
 - ▶ If there is an objection to the hearsay in the social worker's report

Where a party makes a timely and specifically stated objection to the hearsay, that hearsay in the social worker's report cannot alone be sufficient to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based.

Exception: The hearsay can be found sufficient to support the jurisdictional finding where any of the following applies:

- The hearsay is admissible under any statutory or judicial hearsay exception;

²²⁷ Welf. & Inst. Code §319(b)(3), (f); Cal Rules of Ct 5.674(b)(1)

²²⁸ Cal. Rules of Court, rule 5.670(f); see Welf. & Inst. Code § 334.

²²⁹ Cal. Rules of Court, rule 5.682(a); See, Welf. & Inst. Code § 353.

²³⁰ Welf. & Inst. Code § 354.

²³¹ Cal. Rules of Court, rule 5.684(c); Welf. & Inst. Code § 354.

or

- The hearsay declarant is a child under 12 years of age who is the subject of the petition.

Exception – The hearsay is not sufficient to support the jurisdictional finding where the objecting party establishes that the statement was produced by fraud, deceit, or undue influence and is therefore unreliable;

or

- The hearsay declarant is a peace officer, a health practitioner, a social worker, or a teacher and the statement would be admissible if the declarant were testifying in court;

or

- The hearsay declarant is available for cross-examination. Telephone standby is permitted if the person can be present in court within a reasonable time.²³²

➤ Testimony

- ▶ Testimony by a parent, guardian, or other person who has the care or custody of the child made the subject of a proceeding under Welfare and Institutions Code § 300 shall not be admissible as evidence in any other action or proceeding.²³³
- ▶ The privilege not to testify or to be called as a witness against a spouse or domestic partner, and the confidential marital communication privilege, does not apply to dependency proceedings.²³⁴
- ▶ Testimony by a parent, guardian, or other person who has the care or custody of the minor made the subject of a proceeding under Section 300 shall not be admissible as evidence in any other action or proceeding.²³⁵
- After hearing the evidence, the court shall make a finding as to whether or not the child is described by Welfare and Institutions Code § 300 *and the specific subdivision(s)* under which the petition was brought.²³⁶
- If the court finds that the allegations of the petition are not true, it shall order that the petition be dismissed and the child be returned to the physical custody of the parent or guardian immediately. Absent agreement with the parent otherwise, the child must be returned no more than two working days following the date of that finding.²³⁷

²³² Cal. Rules of Court, rule 5.684(d); See, Welf. & Inst. Code §355(c)

²³³ Welf. & Inst. Code § 355.1(f).

²³⁴ Cal. Rules of Court 5.684(e); See, Evid. Code, §§ 972, 986

²³⁵ Welf. & Inst. Code §355.1(f)

²³⁶ Welf. & Inst. Code § 355.1.

²³⁷ Cal. Rules of Court, rule 5.684(h); Welf. & Inst. Code § 355.1.

- If the court determines by a preponderance of the evidence that the allegations of the petition are true, the court will “take jurisdiction.. and set the matter for a disposition hearing.”²³⁸
- Once it does so, the court has exclusive jurisdiction of all issues regarding custody and visitation of the child, and all issues and actions regarding the parentage of the child.²³⁹
- The disposition hearing must occur no later than 10 *court* days after finding jurisdiction (if the child is out of the home) and no later than 30 *days* after jurisdiction finding (if the child is in the home).²⁴⁰
- No continuance is allowed that would cause the disposition hearing to be completed more than 60 days after the detention hearing. A limited exception to this is if the court finds “exceptional circumstances,” but even then, in no event may the disposition hearing be continued more than six months after the detention hearing.²⁴¹

f. Disposition

- The purpose of the disposition hearing is to make such orders to ensure the safety, protection, and well-being of the child.²⁴²
- The court will consider a full array of social and health services to help the child and family and to prevent re-abuse of children.²⁴³ The focus must also be on the preservation of the family to the extent possible.²⁴⁴
- The social study report is due at least 48 hours before the hearing.²⁴⁵
- The court has several options for disposition:
 - a. Parent(s) Voluntary Relinquishment relinquish the child to the state Department of Social Services, to a county adoption agency, or to a licensed private adoption agency²⁴⁶
 - b. Terminate Jurisdiction²⁴⁷
 - c. Not Declare the Child a “Dependent of the Court” and Place the Child Under a Program of Supervision²⁴⁸
 - d. Appoint a Legal Guardian for the Child²⁴⁹ with or without declaring the child a dependent of the court

²³⁸ Cal. Rules of Court, rule 5.684(g); Welf. & Inst. Code § 356.

²³⁹ Cal. Rules of Court, rule 5.510; Welf. & Inst. Code §§ 302(c), 304.

²⁴⁰ Cal. Rules of Court, rule 5.686; Welf. & Inst. Code § 358

²⁴¹ See Welf. & Inst. Code § 352; Cal. Rules of Court, rule 5.550(a).

²⁴² See, Welf. & Inst. Code § 300.2.

²⁴³ See, Welf. & Inst. Code § 300.2.

²⁴⁴ See, Welf. & Inst. Code § 300.2.

²⁴⁵ Cal. Rules of Court, rule 5.690(a)(2).

²⁴⁶ For further discussion, see Welf. & Inst. Code § 361(b).

²⁴⁷ Cal. Rules of Court, rule 5.695(a)(1).

²⁴⁸ Cal. Rules of Court, rule 5.695(a)(2); Welf. & Inst. Code § 360(b).

²⁴⁹ Cal. Rules of Court, rule 5.695(a)(3), (b)(1); Welf. & Inst. Code § 360(a)

- e. Declare Dependency and Permit the Child to Remain at Home with an Order of Family Maintenance Services to be Provided
 - f. Remove and Place with Non-Custodial Parent²⁵⁰
 - g. Declare Dependency and Remove from the Parent or Guardian
- An Indian child cannot be removed unless there is:
- clear and convincing evidence that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.²⁵¹
 - and
 - the court can find that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.²⁵²
- If the child was removed, the court must order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians.²⁵³
- On a showing that that the services will benefit the child, the court may decide to order services for the child and the biological father. ²⁵⁴
- Reunification services can be denied (“bypassed”) to a parent when the court finds, by clear and convincing evidence, any of the circumstances set forth at Welfare and Institutions Code § 361.5(b).
- ▶ If bypass is recommended, the social study must state why reunification services should not be provided.²⁵⁵
 - ▶ Active efforts is still required before reunification services can be bypassed
- Unless jurisdiction is terminated, a review hearing must occur no less than once every six months. This applies whether the child is in an in-home or out-of-home placement. ²⁵⁶

g. Review Hearings (where the child is in an out-of-home placement)

- The court is required to return the child unless it is proved by a preponderance of evidence (i.e., a showing of likelihood of 50% or more) that the child would be at substantial risk if returned to the parent.²⁵⁷
- The social services agency must be shown to have made the required efforts to assist the family in alleviating the risk of harm and whether there are any other services that might be appropriate.

²⁵⁰ Welf. & Inst. Code § 361.2(a).

²⁵¹ Welf. & Inst. Code § 361(c)(6); 25 U.S.C. § 1912(e).

²⁵² Welf. & Inst. Code §§ 361(d), 361.7(a); 25 U.S.C. § 1912(d).

²⁵³ Welf. & Inst. Code § 361.5(a).

²⁵⁴ Welf. & Inst. Code §§ 361.5(a).

²⁵⁵ Cal. Rules of Court, rule 5.690(a)(1)(D)

²⁵⁶ Welf. & Inst. Code § 366(a)(1).

²⁵⁷ Welf. & Inst. Code § 366.21(e)(1), Cal. Rules of Court, rules 5.708(d)(1), 5.710(b).

- The court must consider the safety of the child and determine all of the following:
 - Whether the placement remains necessary and appropriate.
 - Whether the social services agency has complied with the case plan in making active efforts to return the child to a safe home and to complete any steps necessary to finalize the permanent placement of the child.
 - For a child 10 years of age or older, this includes the efforts to maintain relationships between a child and individuals important to the child, consistent with the child's best interests.
 - Whether there should be any limitation on the right of the parent or guardian to make educational decisions or developmental-services decisions for the child.
 - The extent of progress that the parent or guardian has made toward alleviating or mitigating the causes necessitating placement in foster care.²⁵⁸
- The court must consider any other admissible and relevant evidence provided.²⁵⁹
- Same presumption to return applies as discussed above.
- If the child is returned, the court will continue to monitor the family and hold a hearing at least every six months – i.e., “Family Maintenance.”
- If the child is not returned:
 - ▶ A case plan is required to address the needs of the child and the parent.²⁶⁰ Visitation must also be ordered.²⁶¹
 - ▶ The case can be continued if the court can make specific required findings.²⁶²
- If the court terminates reunification services are not ordered, the court must schedule a Welfare and Institutions Code § 366.26 hearing to occur within 120 days.²⁶³

The specific types of Review Hearings are as follows:

i. 6-Month Review Hearing

- The first review hearing must be held six months after the initial dispositional hearing, but no later than 12 months after the date the child entered foster care (as defined by Welfare and Institutions Code § 361.49), whichever occurs earlier.²⁶⁴
- Presumption of return.
- If the child is returned, the court may:
 - order the termination of dependency jurisdiction if the child can be protected without the need for further court supervision.²⁶⁵

²⁵⁸ Welf. & Inst. Code § 366(a)(1).

²⁵⁹ Cal. Rules of Court, rule 5.708(c).

²⁶⁰ Welf. & Inst. Code § 16501.

²⁶¹ Welf. & Inst. Code § 362.1(a)(1)(A).

²⁶² Welf. & Inst. Code § 366.21(g)(1).

²⁶³ Welf. & Inst. Code § 366.21(g)(4).

²⁶⁴ Welf. & Inst. Code § 366.21(e)(1).

or

- order continued dependency services and set a review hearing to occur within 6 months.²⁶⁶
- If the child is *not* returned, at this hearing, a continuation of reunification services is presumed unless one of the following conditions applies.²⁶⁷
 - Where the child or a sibling was under 3 years of age when taken into custody.
 - Where the parent's whereabouts remain unknown.
 - Where the child was placed with the non-custodial parent.

ii. 12-Month Permanency Hearing

- Following the 6-month review hearing, another hearing is required to be held within six months.²⁶⁸ But unlike the 6-month review hearing, this hearing is called a “permanency review hearing.”
- Same presumption to return applies as discussed above.
- Presumption continues to be a return of the child to the parent or guardian's physical custody unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.²⁶⁹
- If the child is not returned to the parent, the case can be continued only if the court can make the following findings.²⁷⁰
 - There is a substantial probability that the child will be returned to the parent or guardian's physical custody and safely maintained in the home within the extended period of time,or
 - That reasonable services have not been provided to the parent or legal guardian.²⁷¹- In order to find a “substantial probability” that the child will be returned to the parent or guardian's physical custody and safely maintained in the home within the extended period of time, the court must find all of the following:
 - That the parent or legal guardian has consistently and regularly contacted and visited with the child.
 - That the parent or legal guardian has made significant progress in resolving problems that led to the child's removal from the home.

²⁶⁵ See, Welf. & Inst. Code § 364; Cal. Rules of Court, rule 5.706(e)(1).

²⁶⁶ Cal. Rules of Court. 5.710(b)(1).

²⁶⁷ Welf. & Inst. Code § 366.21(e)(2).

²⁶⁸ Welf. & Inst. Code § 366(a)(1).

²⁶⁹ Welf. & Inst. Code § 366.21(f)(1), Cal. Rules of Court, rule 5.715(b)(1).

²⁷⁰ Welf. & Inst. Code § 366.21(g)(1).

²⁷¹ Welf. & Inst. Code § 366.21(g)(1); Cal. Rules of Court, rule 5.715(b)(4)(A).

- The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the safety, protection, physical and emotional well-being, and special needs of the child.²⁷²
- The court must consider, among other factors, the parent or legal guardian's good faith efforts to maintain contact with the child.²⁷³
- The reunification services are for no more than 18 months from the date the child was originally taken from the parent or guardian's physical custody.²⁷⁴

iii. 18-Month Permanency Review Hearing

- A permanency review hearing shall occur within 18 months after the date the child was originally removed from the parent or guardian's physical custody.²⁷⁵
- It remains presumed that the child will be returned to the parent or legal guardian's physical custody unless the court finds, by a preponderance of the evidence, that the return would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.²⁷⁶
- Reunification services be continued can only be continued under the following circumstances:
 - (1) that reasonable services have not been provided to the parent or legal guardian.

or

 - (2) there is a substantial probability that the child will be returned to the parent or guardian's physical custody and safely maintained in the home within the extended period of time

To make this finding, the court is required to find all of the following:

- The parent or legal guardian has consistently and regularly contacted and visited with the child.
- In the prior 18 months, the parent or legal guardian has made significant and consistent progress in resolving problems that led to the child's removal from the home.
- The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her substance abuse treatment plan as evidenced by reports from a substance abuse provider as applicable, or complete a treatment plan after discharge from incarceration, institutionalization, or detention, or following deportation to his or her country of origin and his or her return to the United States, and to provide for the child's safety, protection, physical and emotional well-being, and special needs.²⁷⁷
- Where the child is not returned to the parent or guardian and reunification services are terminated, the court sets a §366.26 selection and implementation hearing.

²⁷² Welf. & Inst. Code § 366.21(g)(1), Cal. Rules of Court, rule 5.715(b)(4)(A)(i).

²⁷³ Welf. & Inst. Code § 366.21(g)(3), Cal. Rules of Court, rule 5.715(b)(4)(A)(ii).

²⁷⁴ Welf. & Inst. Code § 366.21(g)(1).

²⁷⁵ Welf. & Inst. Code § 366.22(a)(1), Cal. Rules of Court, rule 5.720(a).

²⁷⁶ Welf. & Inst. Code § 366.22, Cal. Rules of Court, rule 5.720(b).

²⁷⁷ Welf. & Inst. Code § 366.22(b); Cal. Rules of Court, rule 5.720(b)(3)(A).

iv. 24-Month Subsequent Permanency Review Hearing

- Hearing must occur within 24 months after the date the child was originally removed from the parent or guardian's physical custody.²⁷⁸
- Called the "subsequent" permanency hearing because it presumes permanency should already be provided for.
- There is no further option to continue reunification services.
- Presumption continues to be a return of the child to the parent or guardian's physical custody unless the court finds, by a preponderance of the evidence, that the return of the child would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.²⁷⁹
- Where the child is not returned to the parent or guardian and reunification services are terminated, the court sets a §366.26 selection and implementation hearing.

v. Family Maintenance Review Hearings

- To determine whether continued supervision is necessary.²⁸⁰
- Dependency jurisdiction must be terminated unless by a preponderance of evidence it is shown that the conditions exist that would justify initial assumption of jurisdiction under Welfare and Institutions Code § 300 or that such conditions are likely to exist if supervision is withdrawn.²⁸¹
- When the juvenile court terminates its jurisdiction, it has two options: it can refer the matter to the family court to issue orders determining the custody of, or visitation with, the child; or, it may issue orders itself determining the custody of, or visitation with, the child.

h. Selection and Implementation Hearing (Welf. & Inst. Code § 366.26)

- The focus of the selection and implementation hearing (a.k.a. permanency hearing, "two-six," or "366.26" hearing) is the child's permanent plan. The information the court will consider will relate only to its goal of providing a stable permanent home for the child.
- To terminate the parental rights of parent of an Indian child, there must be evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child.²⁸²
- There are several exceptions to the statutory preference for termination of parental rights. As pertinent to Indian children, these exceptions include:²⁸³

²⁷⁸ Welf. & Inst. Code § 366.25(a)(1), Cal. Rules of Court, rule 5.722(a).

²⁷⁹ Welf. & Inst. Code § 366.25(a)(1), Cal. Rules of Court, rule 5.722(b).

²⁸⁰ Cal. Rules of Court, rule 5.706(e); Welf. & Inst. Code § 364.

²⁸¹ Cal. Rules of Court, rule 5.706(e); Welf. & Inst. Code § 364(c).

²⁸² 25 U.S.C. § 1912(f); Welf. & Inst. Code § 366.26(c)(2)(B); See Cal. Rules of Court, rule 5.484(a).

²⁸³ See Welf. & Inst. Code § 366.26(c).

- a. Where the child is living with a relative who is unable or unwilling to adopt, but not because the relative is unwilling to accept legal or financial responsibility for the child, and the removal of the child from the relative would be detrimental to the child. For purposes of an Indian child, “relative” includes an “extended family member,” as defined in the ICWA.
 - b. Where the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances including :
 - The child is living with a foster parent or Indian custodian who is unable or unwilling to adopt the child because of exceptional circumstances, which do not include an unwillingness to accept legal or financial responsibility for the child, and removing the child would be detrimental.
 - The child is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to:
 - ▶ Termination of parental rights would substantially interfere with the child’s connection to his or her tribal community or the child’s tribal membership rights.
 - or
 - ▶ The child’s tribe has identified guardianship, foster care with a fit and willing relative, tribal customary adoption, or another planned permanent living arrangement for the child.
 - c. Where the social services agency has not met its heightened burden for an Indian child:
 - i. If at the hearing terminating parental rights, the court has found that active efforts were not made.
 - ii. If termination of parental rights is not supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.
- The permanent plan will be ordered according to the following preference (in descending order)
- Terminate the rights of the parent(s) and order that the child be placed for adoption.
 - Order a plan of tribal customary adoption.
 - Appoint a *relative* with whom the child is currently residing as legal guardian for the child.
 - Identify adoption or TCA as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days.
 - Appoint a nonrelative legal guardian for the child.
 - Order that the child be permanently placed with a fit and willing relative.
 - Order that the child remain in foster care, but with a permanent plan of return home, adoption, legal guardianship, or placement with a fit and willing relative, as appropriate.
 - Order that the child remain in foster care subject to the conditions of Welfare and Institutions Code § 366.3(c)(4).

i. Post Permanency Review Hearings

- Where jurisdiction has not been dismissed, the child's status must still be reviewed at least every six months. The hearing is for the purpose of determining whether or not reasonable efforts to finalize a permanent placement for the child have been made.²⁸⁴
- The court must consider all permanency planning options for the child. This includes considering whether the child should be returned to the home of the parent. The court will also consider the appropriateness of adoption, TCA, legal guardianship, placement with a fit and willing relative, and a planned permanent living arrangement.²⁸⁵
- The court must order that a Welfare and Institutions Code § 366.26 hearing be held unless there is clear and convincing evidence of a compelling reason for determining that such a hearing is not in the best interest of the child.²⁸⁶

²⁸⁴ Welf. & Inst. Code § 366.3(d). Note: for a review hearing that follows the termination of parental rights see Welf. & Inst. Code §§ 366.3(d), (g), 366.28.

²⁸⁵ Welf. & Inst. Code § 366.3(h)(1).

²⁸⁶ Welf. & Inst. Code § 366.3(h)(1).